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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1604

(Consolidated with Nos. 76-1471, 76-1521, 76-1595, 76-1624, and 76-1685)

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions, Statutes, and Regulations Involved 3

Statement of the Case 3

Summary of Argument 13

Argument 17

I. The Preclusion of Publishers of Daily Newspapers from Holding Licenses for Co-Located Broadcast Stations Is Unconstitutional 17

A. Regulations Conditioning the Right To Publish a Daily Newspaper on Forbearance from Engaging in Broadcasting Are Contrary to the First Amendment 17

B. Discrimination in Broadcast Licensing Against Those Who Exercise Their Basic Civil Right To Publish a Newspaper Also Violates the Equal Protection Guarantee of the Fifth Amendment 27

II. Congress Has Not Delegated Authority to the FCC To Adopt Rules Barring Daily Newspapers from Affiliation with Local Broadcast Stations 29

A. The Statutory Provisions Relied on by the FCC and the Court Below and This Court's Decision in *Storer Broadcasting* Do Not Resolve the Question of Whether the FCC Is Empowered To Adopt Anti-Newspaper Regulations 29

B. Until the Present Case, the FCC, Congress, and the Courts Have Consistently Interpreted

Page

the Communications Act as Giving the FCC No Authority To Discriminate Against Newspaper Owners in Granting or Withholding Broadcast Licenses 34

III. The FCC's Prospective Rules Represent an Unjustified Reversal of Its Prior Licensing Policies Which Is Not Founded on a Reasoned Analysis of the Record 46

IV. The Lower Court Erred in Reversing the FCC's Decision Not To Divest Most Existing Newspaper-Broadcast Combinations 50

A. The FCC Reasonably Concluded from the Record that There Was No Factual Basis for Divestiture and that There Was Support for the Continued Licensing of Existing Broadcast Stations Affiliated with Local Newspapers 50

1. The record contained adequate data for the FCC to use in decisionmaking and the FCC made conclusions based on the record 50

2. The FCC's decision not to divest most existing combinations was based on its conclusions from the record 56

B. The Renewal of Existing Broadcast Station Licenses Held by Local Newspaper Publishers Is Entirely Consistent with Applicable Law and Precedent 59

1. The goal of diversity, as only one of many factors bearing on the public interest, does not create a presumption against newspaper-broadcast cross-ownership 59

2. There is no legal requirement that the FCC act retroactively and divest existing combinations 67

C. The Court of Appeals Went Beyond Its Proper Judicial Role and Purported To Dictate the Rule Which the Agency Must Adopt 72

Conclusion 74

CASES: Page

Ashbacker Radio Corp. v. *FCC*, 326 U.S. 327 (1945) ... 29
Associated Press v. *NLRB*, 301 U.S. 103 (1937) 19
Associated Press v. *United States*, 326 U.S. 1 (1945) ..19, 23
Bolling v. *Sharpe*, 347 U.S. 497 (1954) 27
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 64
Buckeye Cablevision, Inc. v. *FCC*, 387 F.2d 220 (D.C. Cir. 1967) 68
Buckley v. *Valeo*, 424 U.S. 1 (1976) 25
Chemehuevi Tribe of Indians v. *FPC*, 420 U.S. 395 (1975) 45
Chemical Bank New York Trust Co. v. *Steamship Westhampton*, 231 F. Supp. 284 (D. Md. 1964), *aff'd*, 358 F.2d 574 (4th Cir.), *cert. denied*, 385 U.S. 921 (1966) 36
Chicago Police Department v. *Mosley*, 408 U.S. 92 (1972) 18, 28
Citizen Publishing Co. v. *United States*, 394 U.S. 131 (1969) 19
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971) 16, 63
Citizens To Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 51
City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) 28
Clarksburg Publishing Co. v. *FCC*, 225 F.2d 511 (D.C. Cir. 1955) 8
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 25, 26
Columbus Broadcasting Coalition v. *FCC*, 505 F.2d 320 (D.C. Cir. 1974) 69
Committee for Open Media v. *FCC*, 533 F.2d 1 (D.C. Cir. 1976) 69
Community-Service Broadcasting of Mid-America, Inc. v. *FCC*, 41 Rad. Reg. 2d (P&F) 731 (D.C. Cir. Sept. 15, 1977) 28
Crowell v. *Benson*, 285 U.S. 22 (1932) 34
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 73
Fidelity Television, Inc. v. *FCC*, 515 F.2d 684 (D.C. Cir. 1975) 46, 63
FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 17, 72-73
FRC v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933) 22
FTC v. *Mandel Brothers*, 359 U.S. 385 (1959) 36

Page

Gitlow v. *New York*, 268 U.S. 652 (1925) 27
Greater Boston Television Corporation v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) 46, 48, 71
Grosjean v. *American Press*, 297 U.S. 233 (1936) 18, 19
Hawaiian Telephone Co. v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974) 60
Independent Bankers Association of Georgia v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975) 16
Johnson v. *Robison*, 415 U.S. 361 (1974) 27
Knipe v. *Commissioner*, 24 TAX CT. MEM. DEC. (CCH) 668 (1965) 71
Lynch v. *Overholser*, 369 U.S. 705 (1962) 34, 46
Madison Joint School District No. 8 v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) 18
Mancuso v. *Taft*, 476 F.2d 187 (1st Cir. 1973) 28
Mansfield Journal Co. v. *FCC*, 180 F.2d 28 (D.C. Cir. 1950) 61
Massachusetts Bay Telecasters, Inc. v. *FCC*, 261 F.2d 55 (D.C. Cir. 1958), *modified*, 295 F.2d 131, *cert. denied*, 366 U.S. 918 (1961) 62
Mazer v. *Stein*, 347 U.S. 201 (1954) 36
McClatchy Broadcasting Co. v. *FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) 61, 62
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 18, 25, 26
NAACP v. *Button*, 371 U.S. 415 (1963) 28
National Association of Regulatory Utility Commissioners v. *FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) 64
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 22, 23, 59, 67
National Citizens Committee for Broadcasting v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977) .....*passim*
Near v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) .. 19
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) ..17-18
Niemotko v. *Maryland*, 340 U.S. 268 (1951) 18
NLRB v. *Food Store Employees*, 417 U.S. 1 (1974) ... 73
NLRB v. *Gullett Gin Co.*, 340 U.S. 361 (1951) 45
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933) 36

Page

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946) 19
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 46, 50, 64
Pinellas Broadcasting Co. v. *FCC*, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956) 61, 62
Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976) 73
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 22, 23, 55
Reed v. *Reed*, 404 U.S. 71 (1971) 27
Richmond Television Corporation v. *United States*, 354 F.2d 410 (4th Cir. 1965) 71, 72
Saxbe v. *Bustos*, 419 U.S. 65 (1974) 45
Scripps-Howard Radio, Inc. v. *FCC*, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951) 31, 62
SEC v. *Chenery Corporation*, 318 U.S. 80 (1943) 73
SEC v. *Chenery Corporation*, 332 U.S. 194 (1947) 70
Sherbert v. *Verner*, 374 U.S. 398 (1963) 26
Skinner v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) 27
Speiser v. *Randall*, 357 U.S. 513 (1958) 20, 21
Stahlman v. *FCC*, 126 F.2d 124 (D.C. Cir. 1942) ..37, 38, 62
Times-World Corporation v. *United States*, 251 F. Supp. 43 (W.D. Va. 1966) 66, 71
Tri-State Broadcasting Co. v. *FCC*, 96 F.2d 564 (D.C. Cir. 1938) 62
United States v. *American Trucking Associations*, 310 U.S. 534 (1940) 36
United States v. *Macdaniel*, 32 U.S. (7 Pet.) 1 (1833) .. 69
United States v. *Maher*, 307 U.S. 148 (1939) 70
United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 32
United States v. *O'Brien*, 391 U.S. 367 (1968) 28
United States v. *Radio Corporation of America*, 358 U.S. 334 (1959) 60
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 32
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 15, 30, 31, 33
United States v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) 34
United States v. *Witkovitch*, 353 U.S. 194 (1957) 34

Page

WAIT Radio v. *FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) 46

STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. § 706 (2)(A) (1970) 50

Communications Act of 1934, 48 Stat. 1064, *as amended*, 47 U.S.C. § 151 *et seq.*:

Section 2(a), 47 U.S.C. § 152(a) (1970) 3, 30, 32

Section 4(i), 47 U.S.C. § 154(i) (1970) 3, 30, 31

Section 4(j), 47 U.S.C. § 154(j) (1970) 3, 30, 32

Section 301, 47 U.S.C. § 301 (1970) 3

Section 303(g), 47 U.S.C. § 303(g) (1970) 3

Section 303(r), 47 U.S.C. § 303(r) (1970) 3, 30, 31

Section 307(a), 47 U.S.C. § 307(a) (1970) 3, 29, 62

Section 307(d), 47 U.S.C. § 307(d) (1970) 3

Section 308(b), 47 U.S.C. § 308(b) (1970) 30

Section 309, 47 U.S.C. § 309 (1970) 3, 31

Section 309(a), 47 U.S.C. § 309(a) (1970) 30, 31, 62

Section 309(d), 47 U.S.C. § 309(d) (1970) 3

Section 309(e), 47 U.S.C. § 309(e) (1970) 30

Section 310(a), 47 U.S.C. § 310(a) (1970) 30

Section 313, 47 U.S.C. § 313 (1970) 30

Section 402(a), 47 U.S.C. § 402(a) (1970) 10

47 C.F.R. § 1.597 (1976) 66

47 C.F.R. § 73.35 (1976) 3

47 C.F.R. § 73.35(a) (1976) 8

47 C.F.R. § 73.240 (1976) 3

47 C.F.R. § 73.240(a)(1) (1976) 8

47 C.F.R. § 73.636 (1976) 3

Page

47 C.F.R. § 73.636(a)(1) (1976) 8

47 C.F.R. § 73.685(a) (1976) 9

FEDERAL COMMUNICATIONS COMMISSION DECISIONS AND ORDERS:

Applications for Voluntary Assignments or Transfers of Control, 32 F.C.C. 689 (1962) 66

Belo Broadcasting Corp., 47 F.C.C.2d 540 (1974) 60

Cable Television Report and Orders, 36 F.C.C.2d 143 (1972) 68

Capitol Broadcasting Co., 11 F.C.C. 859 (1947) 61

Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725 (1966) 68

First Report and Order (Docket No. 18110), 22 F.C.C. 2d 306 (1970) 5

Further Notice of Proposed Rulemaking (Docket No. 18110), 22 F.C.C.2d 339 (1970) 5, 6

Lee Enterprises, Inc., 23 F.C.C.2d 522 (1970) 60

Memorandum Opinion and Order (Docket No. 18110), 45 F.C.C.2d 768 (1975) 6, 7

Memorandum Opinion and Order, 53 F.C.C.2d 589 (1975) 10

Le Mond, Jones & Fisher, 11 F.C.C. 919 (1947) 61

Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964) 68

Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970) 68, 69

Notice of Proposed Rulemaking, 25 Fed. Reg. 12898 (1960) 66

Notice of Proposed Rulemaking (Docket No. 18110), 33 Fed. Reg. 5315 (1968) 4

Order No. 79, 6 Fed. Reg. 1580 (1941) 36-37

Order No. 79-A, 6 Fed. Reg. 3302 (1941) 37

Page

Orlando Daily Newspapers, Inc., 11 F.C.C. 760 (1946) .60, 61

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 47, 60, 61, 65

Policy Statement on Newspaper Ownership, 9 Fed. Reg. 702 (1944) 37, 45, 60

Radio Wisconsin, Inc., 20 F.C.C. 235 (1955) 61

Revision of FM Broadcast Rules, 40 F.C.C. 720 (1962) . 68

Second Report and Order (Docket No. 18110), 50 F.C.C. 2d 1046 (1975) .....*passim*

Seven (7) League Productions, Inc. (WIII), 1 F.C.C.2d 1597 (1965) 60

Times Publishing Co., 4 F.C.C. 400 (1937) 61

WHDH, Inc., 16 F.C.C.2d 1 (1969) 13

MISCELLANEOUS:

CONFERENCE REPORT No. 2426, 82d Cong., 2d Sess. (1952) 43-44

K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958) 69

FCC, *Report on Chain Broadcasting* (1941) 67

Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471 (1975) 66-67

Hearings on Miscellaneous Bills To Amend the Communications Act of 1934 Before a Subcomm. of the House Interstate and Foreign Commerce Comm., 84th Cong., 2d Sess. 83 (1956) 44

Hearings on S. 1973 Before a Subcomm. of the Senate Interstate and Foreign Commerce Comm., 81st Cong., 1st Sess. (1949) 40, 41

H.R. REP. No. 2095, 78th Cong., 2d Sess. (1945) 37

Legal Opinion of FCC General Counsel Hampson Gary submitted to the Senate Interstate Commerce Committee, Jan. 25, 1937 .....35, 36, 37

Page

Letter from Senator Wheeler, Chairman of the Senate Interstate Commerce Committee to the FCC, Jan. 7, 1937 34-35

The Newspaper-Radio Decision, 7 J. FED. COM. B.A. 11 (Feb. 1944) 45

S. 814, 78th Cong., 1st Sess. (1943) 39

S. 1333, 80th Cong., 1st Sess. (1947) 39

S. 1973, 81st Cong., 1st Sess. (1949) 40, 43

S. REP. No. 741, 81st Cong., 1st Sess. (1949) 39, 41-43

2A [SUTHERLAND] STATUTES AND STATUTORY CONSTRUCTION (4th ed. C. Sands 1973) 45

U.S. CONST. amend. I 3, 14, 63

U.S. CONST. amend. V 3, 14

K. VONNEGUT, JR., *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7 (1961) (Dell ed. 1970) 24

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BRIEF FOR PETITIONER AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

OPINIONS BELOW

The opinion of the court of appeals (A. 339-431) is reported at 555 F.2d 938. The opinions of the Federal Communications Commission (FCC) (A. 134-316 and A. 317-338) are reported at 50 F.C.C.2d 1046 and 53 F.C.C.2d 589.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977 (A. 432-434). The FCC's motion to the court of appeals to stay the mandate was granted in part on April 5, 1977 by order of the court of appeals (A. 435-444). The petition for a writ of certiorari in No. 76-1604 was filed May 16, 1977. The petition for a writ of certiorari was granted and this case was consolidated with Nos. 76-1471, 76-1521, 76-1595, 76-1624, and 76-1685 on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the FCC, consistently with the First and Fifth Amendments to the Constitution and the Communications Act, can adopt a general rule barring daily newspaper publishers from acquiring licenses for any broadcast stations in the communities where their papers are published and requiring broadcasters to forfeit their station licenses as a condition of exercising their right to publish daily newspapers in the communities served by their broadcast stations.

2. Whether the court of appeals overstepped the proper bounds of judicial review of an FCC rulemaking where, because of its different view of the relative weight to be accorded the factors of diversity and public service in broadcasting, it ordered the agency to direct the wholesale divestiture of existing broadcast stations affiliated with local daily newspapers despite the FCC's conclusion, after a balancing of the competing interests, that such action is unnecessary and not in the public interest.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The Fifth Amendment provides, in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Sections 2(a), 4(i), 4(j), 301, 303(g), 303(r), 307(a), 307(d), 309(a), and 309(d) of the Communications Act of 1934, 48 Stat. 1064, *as amended*, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 303(r), 307(a), 307(d), 309(a), and 309(d) are set forth in the Appendix (A. 27-32).

The FCC's Multiple Ownership rules, 47 C.F.R. §§ 73.35, 73.240, and 73.636, are set forth as Appendix F of the FCC's Second Report and Order, 50 F.C.C.2d 1046, 1099-1106 (A. 243-263) and as modified on reconsideration, 53 F.C.C.2d 589, 599 (A. 317-338).

STATEMENT OF THE CASE

This case involves rules adopted by the FCC in 1975 designed to prohibit prospectively the licensing of broadcast stations to persons who also have an interest in daily newspapers in the same communities, without disrupting long-existing ownership patterns.

1. *Introduction*

In the early years of broadcasting, the FCC repeatedly found that the public interest would be served by newspaper owners establishing radio stations in their

communities. Later, when FM radio and television were untried media with an uncertain future, newspaper publishers again pioneered in bringing these new services to the public. In recent years, the numerical significance of newspaper-affiliated stations has declined as some combinations have been voluntarily separated and as other types of businesses have become interested in broadcasting. Nonetheless, many broadcast stations continue to be affiliated with local newspapers.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1250 newspapers representing over 90% of the total daily and Sunday newspaper circulation and a sizable portion of the weekly circulation in the United States. ANPA has for many years been concerned with the rights of its members to engage in broadcasting on an equal basis with all others. Throughout the proceedings below, ANPA has adhered to its basic position that the Constitution precludes the FCC from promulgating any general rule which would disqualify daily newspaper publishers as a class from being granted licenses to operate broadcast stations in the communities where their newspapers are published.

2. *The FCC's Proceeding in Docket No. 18110*

In 1968, the FCC began to explore amendments to its rules which would deny additional new broadcast licenses to applicants who already had one license in the same locality. *Notice of Proposed Rulemaking (Docket No. 18110)*, 33 Fed. Reg. 5315 (1968). The Antitrust Division of the Department of Justice filed comments in response to the FCC's Notice on August 1,

1968, which, without making any specific allegations of anticompetitive practices by newspaper-broadcast combinations, urged the FCC to broaden its proposed "one to a customer" amendment to include daily newspapers as well as the AM radio, FM radio, and television stations over which the FCC has direct licensing responsibility. On March 25, 1970, the FCC adopted its *First Report and Order* in Docket No. 18110, 22 F.C.C.2d 306 (1970) (A. 33), which amended the multiple ownership rules along the lines of its earlier proposal; that is, new licenses would only be granted to applicants who did not already have a license for a broadcast facility in the same market. Existing combinations, however, were grandfathered. 22 F.C.C.2d at 309 (A. 39-40).

On the same date, the FCC adopted a *Further Notice of Proposed Rulemaking* in Docket No. 18110, 22 F.C.C.2d 339 (1970) (A. 101), which expanded its inquiry, as the Antitrust Division had requested, to consider newspaper-broadcast cross-ownership. The *Further Notice* solicited comments on a proposed rule which would limit the ownership interests of a single person or entity in any market to one or more daily newspapers, one television station, or one AM-FM radio combination. 22 F.C.C.2d at 346 (A. 115-116). The effect of the proposed rule would have been to prohibit all new licensing of local broadcast stations to daily newspaper publishers and to require divestiture of all existing combinations. The FCC recognized that "many will challenge our authority to adopt the rules proposed," and called for comments on the question of its jurisdiction. 22 F.C.C.2d at 349 (A. 121). Moreover, although the FCC's proposal was premised on a purpose of "promoting competition among the

mass media" and "maximizing diversification of service sources and viewpoints," 22 F.C.C.2d at 346 (A. 115), the agency did not, at this stage, set forth any findings, or even tentative conclusions, on whether adequate diversity is available or on the question of economic concentration. *See Memorandum Opinion and Order (Docket No. 18110)*, 45 F.C.C.2d 768 (1975) (A. 127-133).

Although uncertain of the benefits the proposed rules might bring, the FCC tentatively predicted that divestiture may not be "too disruptive." 22 F.C.C.2d at 348 (A. 119). For example, although the agency was concerned by the predictions of a study which concluded that a license forfeiture policy would have a serious adverse economic impact on individual licensees and investors and would concentrate the broadcast industry in the hands of larger diversified companies,[1] the agency "supposed" that a proposal involving divestiture over a five-year period, rather than outright forfeiture, would lessen some of the predicted impact. 22 F.C.C.2d at 347-48 (A. 117-119). Even so, the FCC indicated that it had "substantial concern" that there might be a degradation of "the service to be rendered by the individual units after divestiture." 22 F.C.C.2d at 348 (A. 119).

Nearly 200 parties, representing a broad spectrum of interests including combination owners, other broadcasters, and "public interest" groups, filed comments, studies, and replies with the FCC during 1970 and 1971. In 1974, the FCC called for additional informa-

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[1] M. H. Seiden & Associates, An Economic Analysis of the Impact of License Forfeiture on the Television and Radio Broadcasting Industry, summarized in 22 F.C.C.2d at 341-42 (A. 105-108).

tion. *Memorandum Opinion and Order (Docket No. 18110)*, 45 F.C.C.2d 768 (1975) (A. 127). In response, nearly 50 parties, again representing a broad spectrum of interests, filed supplementary comments and studies. In July, 1974, the agency held oral argument for two and one-half days.

3. *The FCC's Second Report and Order in Docket No. 18110*

On January 28, 1975, the Commission adopted its Second Report and Order in Docket No. 18110, *In the Matter of Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C.2d 1046 (1975) (A. 134) (hereinafter cited as SR&O). In the *Second Report and Order*, for the first time, the FCC asserted the claim that it has authority to adopt general rules which discriminate against newspaper publishers in the granting of licenses for broadcast stations in the same communities where their newspapers are published. The FCC acknowledged that "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." SR&O ¶ 102, 50 F.C.C.2d at 1075 (A. 190). The agency summarily rejected, however, ANPA's "major legal arguments" that the FCC has no authority under the Constitution or under the Communications Act to promulgate rules discriminating against newspaper owners in the licensing of local broadcast stations. SR&O ¶¶ 15-23, 50 F.C.C.2d at 1050-52 (A. 142-145).

Assuming that it had the authority to do so, then, the agency adopted rules which forbid granting a standard (*i.e.*, AM), FM, or television broadcast license to

any party who "directly or indirectly owns, operates, or controls . . . a daily newspaper" in the same community.[2] 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (A. 243, 249-250, 256-257). These rules apply to all licensing, including applications for new stations and sales or transfers of existing stations (other than pro forma transfers in the event of reorganization or inheritance). SR&O ¶¶ 100-07, 50 F.C.C.2d at 1074-78 (A. 188-196). Since these rules do not affect existing ownership, they are hereafter referred to as the "prospective" rules.

Upon its review of the evidence before it, the FCC made numerous empirical findings with respect to cross-ownership, including: that there is substantial and increasing diversity in the mass media in most communities (SR&O ¶¶ 47-50, 98, 50 F.C.C.2d at 1060-61, 1073 (A. 161-163, 186)); that, in general, there is significant diversity between affiliated broadcast stations and newspapers (SR&O ¶¶ 131-32, 50 F.C.C.2d at 1089-90 (A. 218-220)); and that newspaper-affiliated broadcast stations tend to be superior licensees (SR&O ¶ 109 & n.26, App. C, 50 F.C.C.2d at 1078 & n.26,

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[2] Specifically, the Commission prohibited granting AM radio licenses where "the grant of such license will result in the predicted or measured 2 mV/m contour, computed in accordance with Section 73.183 or Section 73.186 [of the Commission's Rules], encompassing the entire community in which such newspaper is published." Section 73.35(a) (A. 243). For FM stations, the test is the predicted 1 mV/m contour, Section 73.240(a)(1) (A. 249-250), and for television, the test is the Grade A contour, Section 73.636(a)(1) (A. 256-257). The Grade A contour is, roughly speaking, the area within which 70% of the homes receive good reception 90% of the time. *See* Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 516 n.12 (D.C. Cir. 1955). College and foreign language newspapers were exempted from this rule. SR&O ¶ 101, 50 F.C.C.2d at 1075 (A. 190).

1094-98 (A. 196-198, 228-242)). Despite these findings, the Commission concluded that a prospective ban on newspaper-broadcasting cross-ownership was appropriate. The sole basis given for the prospective rules was the FCC's statement that "[w]e think that any new licensing should be expected to add to local diversity." SR&O ¶ 101, 50 F.C.C.2d at 1075 (A. 190).

With regard to existing combinations, the Commission determined not to disrupt long-established ownership patterns which have consistently and for many years been found to serve the public interest. *See* SR&O ¶ 109, 50 F.C.C.2d at 1078 (A. 196). The Commission recognized that in these cases "divestiture is a harsh remedy, one to be reserved only where the need is overwhelming and the evidence unambiguous . . . ." SR&O ¶ 114, 50 F.C.C.2d at 1083 (A. 207). Therefore, the FCC found that it would be in the public interest to "grandfather" existing combinations except those in certain communities where only one daily newspaper is published and the community is not encompassed by the "city grade signal"[a] of another television (or radio) station not affiliated with the newspaper. SR&O ¶ 114, 50 F.C.C.2d at 1081-83 (A. 202-207). Under this standard, the FCC ordered the divestiture, within five years, of 16 small market newspaper broadcast combinations. SR&O ¶¶ 113-117, 50 F.C.C.2d at 1081-84 (A. 202-208). The FCC's treatment of ex-

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[a] "City grade signal" is a theoretical technical concept describing the predicted field intensity of the broadcast signal. For AM and FM, the minimum city grade signal levels are 5 mV/m and 3.16 mV/m, respectively. SR&O ¶ 114 n.34, 50 F.C.C.2d at 1082 n.34 (A. 205). For television, the levels are: channels 2-6, 74 dBu; channels 7-13, 77 dBu; channels 14-83, 80 dBu. 47 C.F.R. § 73.685 (a) (1976).

isting combinations, including both the grandfathering of most existing licensees and the forced divestiture of a few, is hereafter referred to as its "retrospective" action.

ANPA sought reconsideration of the *Second Report and Order*, and reasserted its arguments that the agency is without authority to adopt either the prospective rules or the retrospective divestiture rules. The agency denied reconsideration. *Memorandum Opinion and Order*, 53 F.C.C.2d 589 (1975) (A. 317). Thereafter, ANPA sought review in the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a). *American Newspaper Publishers Association v. Federal Communications Commission and United States of America, No. 75-1567.* ANPA's appeal was consolidated with appeals by other parties, including some who supported ANPA's position that the FCC had neither a legal nor factual basis for adopting any anti-newspaper rules and others who argued that the FCC had not gone far enough but should have retrospectively ordered the divestiture of all existing combinations.

4. *The Decision of the Court of Appeals*

On March 1, 1977, the court of appeals affirmed the Commission's prospective ban on newspaper-broadcast combinations, but vacated its restrospective actions and remanded the case to the agency for adoption of a new rule embodying a presumption requiring divestiture "except in those cases where the evidence clearly discloses that cross-ownership is in the public interest."

National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938, 966 (D.C. Cir. 1977) (A. 339, 428).

The court rejected ANPA's argument that the prospective ban unconstitutionally burdens the First Amendment right to publish a newspaper and that it violates the right of a newspaper publisher under the equal protection guarantee of the Fifth Amendment to be treated in the same manner in radio licensing as other businessmen. 555 F.2d at 953 (A. 381). In the court's view, the FCC's ban on the licensing of radio stations to newspaper publishers does not trench on constitutionally protected interests, but only "indirectly affect[s] the economics of publication." 555 F.2d at 954 (A. 387).

Having seen no constitutional impediments, the court went on to conclude that this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), which upheld certain FCC rules limiting the number of broadcast stations a party could control, established the agency's statutory authority to impose a prospective ban on control of broadcast stations by newspaper publishers. 555 F.2d at 951-52 (A. 374-378).

Finally, the court found that the prospective ban had a rational basis, even though "there is no guarantee that the prospective ban will increase diversity in all cases," because "the licensing of an independent, rather than an affiliated station, offers greater hope of providing the community a new voice." 555 F.2d at 950 (A. 370).

The court's deference to the FCC's judgment on the merits of the prospective ban contrasts sharply with its treatment of the FCC's retrospective actions. Preliminarily, the court stated that the FCC may adopt

a rule that orders divestiture without individual evidentiary hearings in each case, although it declined to determine whether the divestiture ordered by the FCC in the case of certain small market combinations could have been implemented without individualized hearings. 555 F.2d at 956 (A. 392).

The court then considered the validity of the agency's retrospective actions by first reviewing the record. In the court's view, the evidence before the agency did not compel the actions urged by either the pro-divestiture or anti-divestiture interests. 555 F.2d at 957, 962 (A. 395, 413). Consequently, the court characterized the FCC's retrospective actions as relying "primarily on policy, not [on] factual considerations." 555 F.2d at 957 (A. 395). The court then rejected the FCC's policy determination that the "harsh remedy" of divestiture should not be ordered except in "egregious cases." *See* SR&O ¶¶ 112, 114, 50 F.C.C.2d at 1080-83 (A. 200-207). The FCC had found that preserving local ownership, avoiding disruption of long-established service in the public interest, and local economic dislocations outweighed, in most cases, any "hoped for gain in diversity" to be achieved by divestiture. SR&O ¶¶ 108-09, 50 F.C.C.2d at 1078 (A. 196). The court of appeals, however, disagreed with the FCC's balancing of these various factors and held that "the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a show of harm." 555 F.2d at 965 (A. 424). Also, the court of appeals found that the FCC had not supported its conclusion that a different result of the balancing of these various policies should occur in the 16 small markets where divestiture was ordered. The court's view that even the "speculative" gains in

diversity from divestiture outweigh "lesser policies" led it to the conclusion that a presumption in favor of divestiture should be embodied in new rules to be adopted by the FCC on remand.

ANPA and other parties then petitioned this Court for review.

SUMMARY OF ARGUMENT

1. The prospective rules promulgated by the FCC and the retrospective divestiture required by the court of appeals seriously impair the constitutionally protected right to publish a newspaper. A daily newspaper publisher who is not now engaged in broadcasting would be required to suspend publication of his paper —or to sell it—as the price of entry into the local broadcasting field. A publisher who currently holds a broadcast license in the community in which his paper is published must abandon or sell his newspaper in order to retain his broadcast license. Moreover, these rules will prevent broadcasters—often the only persons in a community who can combine journalistic expertise with adequate capital—from starting a new daily newspaper or acquiring an existing paper which otherwise might cease publication.[4]

Thus, the practical consequences of the rules against local cross-ownership for newspaper publishers are

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[4] Divestiture could have a serious and counterproductive impact on diversity. This is the lesson of the forced separation of the Boston *Herald Traveler* from its broadcast properties in the FCC's celebrated *WHDH* case. WHDH, Inc., 16 F.C.C.2d 1 (1969), *aff'd*, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Only three months after WHDH went off the air, the *Herald Traveler* ceased publication after 125 years, eliminating one of Boston's three daily newspapers without any increase in the number of electronic media outlets.

real and serious. The inhibition on publishing worked by these rules rises to constitutional dimensions because the rules preclude publishers of daily newspapers as a class from holding licenses for co-located broadcast stations upon the same terms and conditions which apply to any other person engaged in any other lawful business.[5] Because these laws attach a condition to the right to disseminate information by publishing a newspaper, they contravene the First Amendment; because they discriminate against one class of citizens on the basis of their exercise of a protected civil right without a demonstrated compelling governmental interest, they violate the equal protection guarantees inherent in the Fifth Amendment.

Both the FCC and the court of appeals failed to give adequate consideration to the fundamental constitutional questions posed by these rules. The determination of the lower court that such regulations may, indeed must, be enacted finds no precedent in the decisions of this or any other court, and is based upon a misconstruction of the decisions of this Court delineating the proper relationship of broadcasting to the First Amendment.

2. The constitutional impediments to adoption by the FCC of a blanket rule prohibiting newspaper-broadcast cross-ownership have long been recognized and are at the root of often repeated Congressional views that the FCC has no authority to adopt such rules. And, as the court below conceded, "no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of

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[5] The only other classes of persons absolutely disqualified from obtaining such a license are aliens and felons.

broadcast stations." 555 F.2d at 951 (A. 374). Nor is such authority necessarily or readily inferable from the more general grants of authority in the Communications Act or this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). To the contrary, the entire scheme of the Communications Act recognizes the basic right of all law-abiding citizens to hold broadcast licenses. Given the ambiguity of the statute itself, the court below should have closely examined the construction given the statute over the years by the FCC, the Congress, and the courts. This examination would have revealed a consistent, longstanding construction that the FCC lacks the authority under the Communications Act to adopt rules such as those here at issue.

3. The prospective rules are also contrary to the requirements of the Communications Act that the FCC consider all factors bearing on the public interest in awarding licenses. Prior to this case, the FCC had long adhered to a policy that diversification of control is only one of the many considerations which must be evaluated in licensing broadcast stations to newspaper owners. In the proceeding below, the FCC reversed this policy without adequate explanation and without making any findings which provide factual support for its sudden change.

4. The aspect of the court of appeals' decision having the most immediate and widespread impact is its order "that divestiture [of all existing local newspaper-broadcast combinations] is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." 555 F.2d at 966 (A. 428). To arrive at this far-reaching conclusion, the court of appeals substituted its own

judgment for that of the FCC on the relevance and significance of the numerous factors which must be taken into account by the FCC in its broadcast licensing decisions and seriously distorted both the content of the record and the FCC's evaluation of it.[6]

Contrary to the somewhat confused picture painted by the court of appeals, the FCC developed a comprehensive record, considered all relevant submissions, and gave a reasoned basis for its final conclusion that most existing combinations should not be divested. There was, then, no legitimate basis for the court of appeals to reverse these conclusions, and its action was apparently dictated by the court's own policy preferences rather than by law.

Moreover, the lower court did not stop with identifying its legal objections to the FCC's order, but went on to prescribe the rule—a presumption of complete divestiture of all combinations—that the FCC must

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[6] In one respect, the court of appeals' reversal of the FCC's divestiture policy was correct, insofar as it vacated "such portions of the *Order* that have retroactive effect," 555 F.2d at 966 (A. 428), namely, the forced divestiture of 16 small-market combinations. ANPA argued in the court of appeals that, in addition to constitutional and statutory impediments, the FCC's decision was legally deficient as contrary to the agency's policy of reasonably assuring renewal for superior service. *See* Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971). Moreover, such divestiture by rule ignores essential factual questions which must be explored in an evidentiary hearing. *See* Independent Bankers Ass'n of Ga. v. Board of Governors of the Federal Reserve Sys., 516 F.2d 1206, 1216 (D.C. Cir. 1975). In view of the action by the court of appeals, ANPA does not specifically renew these arguments in this Court. Indeed, to the extent that the court of appeals found the divestiture of these combinations was not supported by the record, ANPA agrees. *See* 555 F.2d at 966 (A. 428).

adopt on remand. The court thereby arrogated to itself legislative power reserved by Congress for the administrative agency. Directly controlling precedents of this Court require reversal. *E.g., FPC v. Idaho Power Co.*, 344 U.S. 17 (1952).

* * *

In sum, there is no justification under the Constitution or the Communications Act or in the record below for either the FCC's anti-newspaper rules or the even broader divestiture ordered by the court of appeals. Moreover, even without reaching the question of the FCC's authority, neither legal requirements nor the factual record require divestiture by rule of any existing combination and, to the extent the FCC took into account such factors as the quality of service to the public and the equities against disrupting long-established operations on theoretical policy grounds in refusing to divest most existing combinations, its actions were both within its discretion and rational.

ARGUMENT

I. THE PRECLUSION OF PUBLISHERS OF DAILY NEWSPAPERS FROM HOLDING LICENSES FOR CO-LOCATED BROADCAST STATIONS IS UNCONSTITUTIONAL

A. Regulations Conditioning the Right To Publish a Daily Newspaper on Forbearance from Engaging in Broadcasting Are Contrary to the First Amendment

The First Amendment guarantees every American the right to communicate ideas and information through the publication of a newspaper, pamphlet, or other printed matter. Its protection goes well beyond merely prohibiting censorship in guaranteeing our "profound national commitment to the principle that debate on public issues be uninhibited, robust, and

wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). As this Court recently stated in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256 (1974):

> "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."

Thus, although the inhibiting effect of these rules on the right to publish a newspaper may take a novel form, they are still subject to the limitations of the First Amendment and must be critically examined in light of its guarantees. The prior decisions of this Court provide a general framework within which the FCC's rules and the action of the court of appeals may be analyzed.

This Court has frequently invalidated governmental actions that curtail expression by favoring certain classes of speakers over others. *See Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,* 429 U.S. 167, 175-76 (1976); *Chicago Police Department v. Mosley,* 408 U.S. 92, 97-98 (1972);[7] *Niemotko v. Maryland,* 340 U.S. 268 (1951). The imposition of discriminatory burdens on the publishing of a daily newspaper has been specifically condemned by this Court. In *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), the Court held unconstitu-

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[7] In *Mosley,* 408 U.S. at 100-01, the Court rejected the argument of the City of Chicago that, although it permitted peaceful labor picketing, it could prohibit all non-labor picketing because, as a class, non-labor picketing is more prone to produce violence than labor picketing. The Court stated that such judgments are appropriately made on an individualized basis. *Id.* at 101.

tional a state tax on gross receipts from advertising imposed only on newspapers with weekly circulations over 20,000. The Court concluded that "by the First Amendment it was meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, or their circulation. . . ." 297 U.S. at 249.

The tax in question in *Grosjean* was constitutionally offensive because it was "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled. . . ." *Id.* at 250. Thus, this Court recognized in *Grosjean* both that a right to publish is the necessary mechanism for ensuring the public's right to receive information and that economic sanctions on individual publishers can interfere with this right as much as censorship. Of course, neither *Grosjean* nor any other First Amendment decision of this Court grants newspaper publishers "special immunity from the application of general laws." *Associated Press v. NLRB,* 301 U.S. 103, 132 (1937). What *Grosjean* does forbid is the enactment of discriminatory legislation abridging the right to engage in newspaper publication. *See also Citizen Publishing Co. v. United States,* 394 U.S. 131, 139 (1969); *Associated Press v. United States,* 326 U.S. 1, 20 (1945). *Cf. Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 720 (1931). This Court has explained the evil which was condemned in *Grosjean* as the "singling out of the press for treatment different from that accorded other business in general." *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 194 (1946).

The treatment of newspapers by the FCC and court of appeals involves just such a "singling out of the press." An existing daily newspaper publisher who is

not now in the broadcasting business is precluded—unless he ceases publishing—from being licensed to own a broadcast station in the same city even though any other citizen doing business in that city is eligible to apply for the license and to have the public interest in granting his application evaluated by the FCC. A prospective local newspaper publisher already in the broadcasting business is subject to an even greater sanction: he must give up his right to have the renewal of his valuable broadcasting license considered on the merits—with the reasonable expectation of renewal if he can show that his operation of the station will continue to serve the public interest—as a condition to his entry into the publishing business. Finally, the broad retrospective divestiture ordered by the court below requires that an existing daily newspaper publisher who has a co-located broadcast station must cease publication altogether as the price of retaining his station license. By focusing only on the *public right* to *receive* information, the FCC and the court below have severely inhibited the *private right* to *disseminate* information by publishing a newspaper.

In addition to condemning the selective imposition of economic burdens on those who publish newspapers, this Court has also invalidated legislation on the more general ground that it imposes an unconstitutional burden on the exercise of First Amendment rights by forcing a choice between the exercise of those rights and the receipt of a valuable government privilege. In *Speiser v. Randall,* 357 U.S. 513 (1958), this Court struck down a California statute which provided that veterans would be denied a special property tax exemption unless they signed a loyalty oath. Since speech proscribed by the loyalty oath might be entitled to pro-

tection under the First Amendment, the Court determined that the oath represented an unconstitutional condition to the granting of the property tax exemption. In so holding the Court observed:

> "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." 357 U.S. at 518.

The Court rejected California's argument that the denial of a tax exemption does not infringe speech since the exemption (like a broadcast license) is only a government privilege. The Court explained:

> "It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. *See Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156; cf. *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407, 430-31 (Brandeis, J., dissenting). This Court has similarly rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, *American Communications Assn.* v. *Douds*, 339 U.S. 382, 402, or the opportunity for public employment, *Wieman* v. *Updegraff*, 344 U.S. 183. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 518-19.

As the above decisions of this Court demonstrate, a grave constitutional question is presented by any governmental action which conditions eligibility for such a valuable privilege as a broadcast license on refraining from exercising a right as fundamental as that of

publishing a newspaper. Because the broadcast spectrum is limited, the Commission must make choices among various means of accommodating the public's interest in freedom of expression. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). No decision of this Court, however, supports the assertion, advanced by the Commission and approved by the court of appeals, that the singling out of newspaper owners for subjection to exclusionary regulations, different from those applied to any other broadcast license applicants in a given community, is within the range of the agency's constitutionally permissible choices.

The court below apparently believed that *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), and *FRC v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933), are dispositive of the First Amendment objections to the anti-newspaper rules. Those cases, however, establish only that the First Amendment is not offended by the denial of a broadcast license under statutory "public interest" standards. The only "free speech" interest at stake was the right to use broadcast facilities. None of the cases relied on by the court below addressed the right to disseminate information to the public by publishing a newspaper, a cherished First Amendment right distinct from the right of access to the broadcast spectrum, and none support the agency's assertion of authority to exclude an entire class of potential applicants from eligibility for broadcast licenses.

The Court in *Nelson Brothers* merely upheld the power of the FCC's forerunner, the Federal Radio Commission, to allocate frequencies in the limited

broadcast spectrum and to grant or deny individual licenses in accordance with broad public interest considerations.

In *NBC*, the Court sustained the FCC's authority to adopt regulations which provided that licenses would not be granted to broadcasters who engaged in certain "chain broadcasting" practices deemed to be contrary to the public interest. The court cautioned that "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis." 319 U.S. at 226. The cross-ownership restrictions at issue in this proceeding would deny licenses to persons (newspaper publishers) because of who they are, not because of the practices in which they engage. The *NBC* decision certainly provides no support for such a denial.

The *Red Lion* decision concerned the FCC's "fairness doctrine." The Court in that decision confirmed the Commission's power to require a licensee to share his frequency with others. Thus, to the extent the Court addressed the question of by whom the spectrum may be used, it affirmed a right of potential access for all, not a right to exclude some.

The court of appeals also relied heavily on the undisputed assertion that "[f]reedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult," 555 F.2d at 953 (A. 381), citing *Associated Press v. United States*, 326 U.S. 1 (1945), to support the assertion. The *Associated Press* case stands, however, only for the proposition that the First Amendment provides no immunity from laws of general applicability—in

that case, the Sherman Act. The vice of the cross-ownership ban mandated by the lower court is that it is not a law of general applicability; it singles out newspaper publishers for special and discriminatory treatment. The regulations thus go far beyond the point of causing the same incidental difficulty to publishers as to other businesses. Rather, the FCC rules affirmatively burden the right to publish by imposing the requirement of foregoing a right available to citizens engaging in any lawful occupation other than newspaper publishing. They do not merely "make publication more difficult"; they prevent it altogether if the would-be publisher happens to hold a local broadcast license.

The court of appeals went so far as to assert that prospective and retrospective divestiture of newspaper publishing and broadcasting properties serves First Amendment interests rather than conflicting with them. *See* 555 F.2d at 950, 953-54 (A. 374, 381-385). This remarkable interpretation of the First Amendment seems to flow from the court of appeals' view that the primary goal of the First Amendment is to place the government in the role of a "Handicapper General"[8] with a

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[8] A short story by Kurt Vonnegut describes an imaginary United States of 2081 in which equality is forced into reality by means of a least common denominator limit on competence. Each citizen is assigned a "handicap" to compensate for whatever natural gift he may have. Thus, a person with keen eyesight must wear glasses which distort his vision, while a clever thinker wears earphones which broadcast air raid siren noises every thirty seconds to interfere with his cognitive processes. Presiding over the program is "Handicapper General" Diana Moon Glampers, whose mission is to prevent society from slipping "right back to the dark ages again, with everybody competing against everybody else." K. VONNEGUT, JR., *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7, 9 (1961) (Dell ed. 1970).

duty to equalize public debate, rather than the traditional view that the primary function of the First Amendment is to prohibit any unnecessary governmental interference in the free marketplace of ideas. Nowhere did the court of appeals more baldly state its view than when it notes that "[o]ne way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one." 555 F.2d at 950 n.32 (A. 372).

Only a warped interpretation of the First Amendment—one which finds it permissible for the government to suspend or weaken the power of a party to speak—could justify the course, taken by the agency and the court below, which prevents newspaper publishers from speaking through the broadcast medium and prohibits broadcasters from exercising their right to publish a newspaper. This Court has made it clear, however, that diversity arguments of this sort cannot be supported by the First Amendment. On the contrary, the concept "that government may restrict the speech of some elements of our society in order to enhance the relative voice of others" has been condemned as "wholly foreign to the First Amendment." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976). Indeed, this Court on several occasions has held that the First Amendment is not to be used as a sword to require a particular form of government regulation to promote diversity of ideas. *See Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 (1973).

In the *Tornillo* decision, the Court struck down as unconstitutional Florida's "right to reply" statute that granted a political candidate a right to equal space to

answer criticism and attacks on his record by a newspaper. The Court found the statute to represent an impermissible intrusion into the function of editors in choosing what material goes into a newspaper. Justice White noted in his concurrence that

> "the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed." *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. at 260 (White, J., concurring).[9]

In sum, broadcast licensing rules which discriminate against newspaper publishers unconstitutionally burden the right to publish a newspaper. The fact that this burden assumes the form of denial of licenses for colocated broadcast stations rather than a fine, injunction, or tax is irrelevant, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner,* 374 U.S. 398, 404 (1963). Indeed, the rules at issue here, requiring an "either/or" choice between broadcasting and publishing a newspaper, may well present an even more severe sanction against the exercise of the First Amendment right to publish a newspaper than the "right of access" law which was struck down in *Tornillo.*

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[9] In *CBS,* this Court determined that the "public interest" standard of the Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept editorial advertisements. The Court warned that such a requirement would entail "the risk of an enlargement of Government control over the content of broadcast discussion of public issues." 412 U.S. at 126.

B. Discrimination in Broadcast Licensing Against Those Who Exercise Their Basic Civil Right To Publish a Newspaper Also Violates the Equal Protection Guarantee of the Fifth Amendment

The discrimination against newspaper publishing which is offensive to the First Amendment likewise raises serious questions under the equal protection guarantee implicitly found in the Fifth Amendment by *Bolling v. Sharpe*, 347 U.S. 497 (1954).[10] The right to equal protection assures that the government cannot "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). A denial of equal protection is subject to "strict scrutiny" where the classification involved affects "basic civil rights." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Among those rights is the right to publish a newspaper. *Gitlow v. New York*, 268 U.S. 652 (1925).

The court of appeals asserted that "strict scrutiny is not required because the ban does not trench upon protected First Amendment interests." 555 F.2d at

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[10] While equal protection law has been most developed under the Fourteenth Amendment, it is well settled that an equal protection requirement is incorporated into the due process clause of the Fifth Amendment, and thus applies to actions of the federal government. *See* Johnson v. Robison, 415 U.S. 361, 364-65 n.4 (1974).

953 n.44 (A. 381)." The lower court, however, failed to recognize that this Court has required strict scrutiny whenever a classification is even "closely intertwined" with First Amendment rights. *Chicago Police Department v. Mosley*, 408 U.S. 92, 95 (1972). *See also NAACP v. Button*, 371 U.S. 415, 438 (1963); *Community-Service Broadcasting of Mid-America, Inc v. FCC*, 41 Rad. Reg. 2d (P&F) 731 (D.C. Cir. Sept. 15, 1977); *Mancuso v. Taft*, 476 F.2d 187, 192-96 (1st Cir. 1973).

Under this standard, "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Chicago Police Department v. Mosley, supra*, 408 U.S. at 95." The rules in question fail this criterion. In the first place, even though the government has an interest in diversity of ownership of electronic communications, it has no legitimate interest in suppressing broadcast speech by newspaper publishers who can meet the

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[11] The court of appeals dismissed ANPA's equal protection argument in a footnote (555 F.2d at 953, n.44) (A. 381), relying primarily on this Court's decision in City of New Orleans v. Dukes, 427 U.S. 297 (1976), which, however, merely holds that the federal judiciary will not attempt to second-guess state economic regulations embodying classifications. Here, both the FCC and the court of appeals expressly rely to a substantial, if not exclusive, degree on First Amendment considerations rather than on economic considerations in justification of the proposed ban on newspaper-broadcast cross-ownership.

[12] *See also* United States v. O'Brien, 391 U.S. 367, 377 (1968), in which this Court stated that a regulation that incidentally tends to curtail free expression is valid only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Communications Act public interest standards for providing good service. Nor does the government have an interest in preventing broadcasters from engaging in newspaper publishing. Second, the record below does not establish that the draconian remedy of complete separation of local publishing and broadcasting mandated by the FCC and approved by the court of appeals is a suitable or necessary method to further any interest the government may have. The FCC has ample authority to supervise newspaper-affiliated broadcast stations to ensure their operations in the public interest and for decades has done so. In view of that authority and of the enforcement mechanisms available to the Commission, the wholesale classification of local newspaper publishers as ineligible to hold broadcast licenses is a far greater restriction than is necessary to further the governmental or public interest at stake.

II. CONGRESS HAS NOT DELEGATED AUTHORITY TO THE FCC TO ADOPT RULES BARRING DAILY NEWSPAPERS FROM AFFILIATION WITH LOCAL BROADCAST STATIONS

A. The Statutory Provisions Relied on by the FCC and the Court Below and This Court's Decision in *Storer Broadcasting* Do Not Resolve the Question of Whether the FCC Is Empowered To Adopt Anti-Newspaper Regulations

In the allocation of available facilities for radio and television broadcasting, the FCC is required to grant a license to "any applicant" when it finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a). In cases where a number of applicants seek mutually exclusive broadcast licenses, the FCC must consider all applicants, on a basis of initial equality, in a comparative hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

The only class of persons categorically excluded by the Act from eligibility for broadcast licenses is that of aliens and foreign-controlled corporations. 47 U.S.C. § 310(a). In addition to citizenship, the Act specifically authorizes the Commission to consider the character, financial, and technical qualifications of applicants. 47 U.S.C. § 308(b). Also, the Commission is directed to refuse a license to anyone whose license previously has been revoked by a court as a sanction for violation of the antitrust laws applicable to the field of communications. 47 U.S.C. § 313. Finally, because of the limited number of broadcast stations technically possible, the FCC has authority to restrict the total number of stations which may be owned by one entity. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

The Act nowhere empowers the FCC to classify citizens, on an *a priori* basis, into groups eligible and not eligible to hold broadcast licenses. On the contrary, the scheme established by Congress envisions individualized consideration of applicants, by means of a hearing if necessary, to resolve any substantial and material questions of fact or to make the requisite "public interest, convenience, and necessity" finding. 47 U.S.C. § 309(a) and (e).

Even though authority to bar daily newspaper publishers from holding local broadcast licenses can be found neither in the specific provisions of the Communications Act nor in the overall statutory scheme, the court below inferred such authority from the language of 47 U.S.C. §§ 309(a), 303(r) and 154(i) (noting that the Commission had also cited 47 U.S.C. §§ 152(a) and 154(j)) and from this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S.

192 (1956). 555 F.2d at 951 (A. 374). Yet these statutory provisions and *Storer*, whether taken singly or together, do not resolve the question of the FCC's authority to adopt anti-newspaper regulations.

The court below first cited the requirement of 47 U.S.C. § 309(a) that the Commission find that the "public interest, convenience and necessity will be served" by the grant of a license. Section 309(a) is, at most, however, authority only for the proposition that the FCC must consider the public interest standard "in the case of each application" filed with it. ANPA does not challenge the well-established authority of the FCC, under Section 309, to consider diversity as one of the "many factors" bearing on the public interest affecting broadcast licenses. *See, e.g., Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951). But the requirement of Section 309 that the agency consider "each application," and, if necessary, hold hearings to determine the public interest, by no means supports an inference that Congress intended to empower the FCC to adopt a blanket prohibition barring the grant of a broadcast license to any publisher of a co-located daily newspaper.

Section 4(i) of the statute, 47 U.S.C. § 154(i), also relied upon by the court below, is not a delegation of substantive authority at all, but merely authorizes the agency to make such rules, "not inconsistent with this Act, as may be necessary in the execution of its functions." Whether a given rule satisfies these requirements obviously depends upon whether it is reasonably in aid of the FCC's powers as spelled out by Congress elsewhere in the Act. Similarly, Section 303(r) is not a delegation of substantive authority, but merely empowers the FCC to make such rules "not inconsistent

with law, as may be necessary to carry out the provisions" of the Communications Act.

Section 4(j), 47 U.S.C. § 154(j), cited by the Commission, provides that the FCC "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Regardless of the importance of this provision in permitting the FCC to employ procedural flexibility in carrying out its functions, it does not expand the agency's authority to propound substantive legislative rules of the kind here adopted.

Section 2(a), 47 U.S.C. § 152(a), also cited by the Commission, merely states that the Communications Act applies to "all interstate and foreign communication by wire or radio." In no way can this general provision be construed to permit the agency to adopt rules making a class of citizens ineligible to be licensees merely because they are engaged in another lawful business, *e.g.*, newspaper publishing.[13]

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[13] That the FCC's authority under § 2(a) is not without limits was stressed in two recent decisions of the Court relating to the Commission's assertion of authority over CATV systems. In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Court agreed with the FCC that § 2(a) gave it authority to regulate CATV as a form of "communication by wire or radio." Four years later, Chief Justice Burger, commenting in a concurring opinion on the Court's 5-4 decision upholding the FCC's requirement that CATV systems originate programming, stated:

> "Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, *so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.*" United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (emphasis added).

Just as these statutory provisions are not dispositive on the question of whether the FCC has the authority to adopt anti-newspaper regulations, neither is *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The contention of the court below that "[i]t requires no extension of *Storer* to conclude the Commission possessed statutory authority to impose the prospective ban"[14] is unsupportable. *Storer* merely acknowledged the FCC's authority to allocate scarce spectrum by regulating the total number of broadcast stations which could be licensed to one entity. While it recognized the power of the FCC to pursue the policy of diversification of ownership by adopting rules prohibiting certain broadcasters from obtaining additional licenses, *Storer* did not reach the different question of whether the Communications Act authorizes the FCC to make rules that prohibit the licensing of all members of some other group, such as local newspaper publishers, who are not broadcasters.[15]

Thus, neither *Storer* nor the provisions of the Communications Act relied on by the court below can resolve the question of whether the FCC has the authority to adopt the anti-newspaper rules here at issue. Because of this ambiguity, and because of this Court's repeated admonition that "a statute should be interpreted, if fairly possible, in such a way as to free it

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[14] 555 F.2d at 951 (A. 374) (footnote omitted).

[15] The Court in *Storer* expressly recognized the limited scope of the rules there at issue. In discussing whether respondent Storer had standing to challenge the FCC rules, the Court stated: "The regulations here under consideration presently aggrieve the respondent. *The Commission exercised a power of rulemaking which controls broadcasters.*" 351 U.S. at 199 (emphasis added).

from not insubstantial constitutional doubts,"[16] the court below should have examined, and this Court should now examine, the construction given the Act over the years by the FCC, Congress, and the courts.

B. Until the Present Case, the FCC, Congress, and the Courts Have Consistently Interpreted the Communications Act as Giving the FCC No Authority To Discriminate Against Newspaper Owners in Granting or Withholding Broadcast Licenses

Beginning in 1937, only three years after passage of the Communications Act, and continuing until this case, the FCC and Congress have consistently interpreted the Act as not giving the FCC authority to discriminate against newspaper owners in granting or withholding broadcast licenses, and the only court to consider the issue reached the same conclusion. FCC spokesmen in three decades have assured Congress that the Commission lacked the authority to promulgate rules such as those at issue, and Congress has expressly relied on these assurances in declining to spell out more clearly in the Communications Act this lack of authority.

The first assurance given by the Commission to Congress was that of the FCC's first General Counsel, Hampson Gary. Mr. Gary, in January 1937, received an inquiry from Senator Wheeler, Chairman of the Senate Interstate Commerce Committee, as to whether or not the Commission "has the authority, at the present time, to deny an application of a newspaper for radio facilities, on the ground that it is against public

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[16] Lynch v. Overholser, 369 U.S. 705, 711 (1962) (citations omitted). *See, e.g.*, United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); United States v. Witkovich, 353 U.S. 194, 199 (1957); Crowell v. Benson, 285 U.S. 22, 62 (1932).

policy." Mr. Gary summarized his position in response to the inquiry as follows:

> "In my opinion, therefore, the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy." [17]

As the first General Counsel of the FCC, Mr. Gary was uniquely aware of Congress' intent and purposes in enacting the Communications Act, and his interpretation is entitled to great weight in determining the agency's authority to enact the rules here in issue.[18]

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[17] Legal Opinion of FCC General Counsel Hampson Gary submitted to the Senate Interstate Commerce Committee, Jan. 25, 1957. (A. 445, 449).

[18] The court below belittled the significance of Mr. Gary's statement on the grounds that he did not consider "whether the Commission may enact license qualifications in the public interest." 555 F.2d at 952 (A. 378). But Mr. Gary was, indeed, responding to an inquiry as to whether the Commission "has the authority" to deny licenses to newspapers on "public policy" grounds. His response, in effect, was that "public interest," not "public policy," was the statutory standard, and that newspaper ownership was "one fact among others to be considered." Had Mr. Gary felt that "license qualifications" could be used to deny licenses to all co-located newspapers, it surely would have been appropriate for him to say so in his discussion of the FCC's "authority".

The fact that Mr. Gary had concluded that the Commission lacked the authority here at issue is further evidenced by his answer to Senator Wheeler's second question, "whether *if the Commission has not such authority at the present time*, legislation could be passed denying the right for all newspapers to acquire radio stations in the future and requiring all newspapers within a reasonable time to divest themselves of the ownership and control of such stations." (Emphasis added.) The fact that Mr. Gary entitled this

This Court summarized the applicable principle in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), ruling that a long-standing prior administrative interpretation

> "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Accord, FTC v. Mandel Brothers, 359 U.S. 385, 391 (1959); *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940).[19]

The outcome of the FCC's only investigation of newspaper-broadcast cross-ownership prior to the proceeding below was completely in accord with General Counsel Gary's opinion. In 1941, the FCC commenced an investigation into newspaper ownership of broadcast stations as part of its early efforts to formulate policies for the licensing of FM radio stations. *Order No. 79*, 6

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part of his letter "Whether Legislation Could Be Passed . . ." and omitted the qualifying "if the Commission has not such authority at the present time," is further evidence that Mr. Gary had indeed concluded in his answer to Senator Wheeler's first question that the FCC did lack the authority to deny "the right for all newspapers to acquire radio stations in the future and [require] all newspapers within a reasonable time to divest themselves of the ownership and control of such stations."

[19] Moreover, the weight to be attached to such an interpretation is undiminished by a later attempt by the agency to reverse its long-standing administrative practice. Mazer v. Stein, 347 U.S. 201, 213 (1954); Chemical Bank New York Trust Co. v. Steamship Westhampton, 231 F. Supp. 284 (D. Md. 1964), *aff'd*, 358 F.2d 574 (4th Cir.), *cert. denied*, 385 U.S. 921 (1966).

Fed. Reg. 1580 (1941); *Order No. 79-A*, 6 Fed. Reg. 3302 (1941). Three years later, the agency concluded the investigation and dismissed the proceeding with the following statement in a public notice:

> "The Commission has concluded, in the light of the record in this proceeding and of the grave legal and policy questions involved, not to adopt any general rule with respect to newspaper ownership of radio stations." 9 Fed. Reg. 702 (1944).[20]

Consistent with Mr. Gary's opinion that an "expression of public policy on the subject by the Congress" was a mandatory prerequisite to any rule banning newspaper-broadcast cross-ownership, and after reviewing the FCC's cross-ownership investigation and holding its own hearings, the House Select Committee To Investigate the FCC stated in its Final Report:

> "Manifestly, if at any future time, newspaper owners or persons interested therein as such are to be excluded from ownership of licensed radio stations, such exclusion should be effected pursuant to a clear-cut expression of such a policy by the Congress." H.R. REP. No. 2095, 78th Cong., 2d Sess. 17 (1945).

While the FCC's cross-ownership investigation was pending, the D.C. Circuit had also concluded that the FCC is not empowered to enact a rule barring newspaper ownership of broadcast stations. *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942). James G. Stahlman, publisher of the Nashville *Banner*, had de-

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[20] The FCC simultaneously announced:

> "A summary of the evidence in the proceeding is being forwarded to the appropriate committees of the Senate and House of Representatives in order to inform them of the facts developed by the investigation and for any consideration which they may desire to give the matter." 9 Fed. Reg. 702 (1944).

clined to answer an FCC subpoena on the ground that the investigation was beyond the Commission's authority under the Communications Act. The FCC had obtained an order from the district court compelling Mr. Stahlman to testify. On appeal Stahlman contended:

> "[T]he sole question is whether the Commission has the power to consider or to adopt and apply a general policy or rule by which persons engaged in the newspaper publishing business or associated therewith may by reason of that fact alone be differentiated as a class apart from all other persons for the purpose either of preference in the assignment of radio facilities or of disqualification from engaging in the radio broadcasting business." 126 F.2d at 126.

The D.C. Circuit affirmed the district court's order on the limited ground that the subpoena was supported by the FCC's general power to conduct proceedings of an investigative character. At the same time, however, the court emphasized the narrow scope of the FCC's inquiry, stating that the agency is not empowered to enact a rule barring newspaper ownership of broadcast stations. In so doing, the court made the following extensive observations which, until departed from by the court below (555 F.2d at 952 (A. 378)), remained the authoritative judicial statement on the issue:

> "[W]e have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App.D.C. 292, 96 F.2d 564. Further consideration confirms that view.
>
> [The authority to assess the qualifications of applicants for broadcast licenses] does not embrace and should not be extended by implication to embrace

> a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it. This, we think, would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act, and likewise in contravention of that vital principle that whatever fetters a free press fetters ourselves. In this view, we need not consider whether the power exists even in Congress, for Congress has not undertaken, and probably never will undertake, to delegate such power to the Commission." 126 F.2d at 127.

During the 1940's and early 1950's, Congress considered amending the Communications Act so as expressly to prohibit the FCC from discriminating against newspapers in the granting of broadcast applications. Congress ultimately chose not to enact such an anti-discrimination provision solely because of FCC assurances that the agency lacked such authority under the 1934 Act, and its own concurrence in that judgment. S. REP. No. 741, 81st Cong., 1st Sess. 2 (1949). *See* CONFERENCE REPORT No. 2426, 82d Cong., 2d Sess. (1952).

The first legislative anti-discrimination proposal was the White-Wheeler Bill, S. 814, 78th Cong., 1st Sess. § 32 (1943), which later became embodied in the White-Wolverton Bill, S. 1333, 80th Cong., 1st Sess. § 25 (1947).[21] After hearings were held, the Interstate and

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[21] The bill proposed a new Section 418 of the Act:

"Discrimination Prohibited

"Sec. 418. The Commission shall make or promulgate no order, rule or regulation of substance or procedure, the purpose or effect of which will or may be to effect a discrimination

Foreign Commerce Committee terminated consideration of the proposal.

A second major provision dealing with newspaper ownership of broadcast stations, Senate Bill 1973, was first introduced by Senator McFarland in 1949 as part of a comprehensive bill designed to rewrite major portions of the Act. Section 14 of S. 1973, intended as an amendment to Section 332 of the Act, provided:

> "Limitation on Rule-Making Powers; Discrimination Prohibited
>
> "Sec. 332. No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation or kind of lawful occupation or business association."

In testimony on this section before a Subcommittee of the Interstate and Foreign Commerce Committee, Acting FCC Chairman Hyde recognized that the principal intent of the section was to outlaw the possibility of any rule excluding newspaper owners from owning radio stations and stated that the FCC had no objection to such a provision. *Hearings on S. 1973 Before a Subcomm. of the Senate Interstate and Foreign Commerce Comm.*, 81st Cong., 1st Sess. 21 (1949). More impor-

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between persons based upon race, or religious or political affiliation, or kind of occupation, or business association, and no rights, privileges, benefits, or licenses authorized by law shall be denied or withheld in whole or in part where adequate right or entitlement thereto is shown."

tantly, Mr. Hyde, in an exchange with Senator Capehart, stated his belief that the FCC did not have the authority to adopt rules which discriminated against someone on the basis of his lawful business:

> "SENATOR CAPEHART. May I ask this question? Is there anything in the law which would prohibit the Commission tomorrow saying, 'We will not issue a license to any person in X business'?
>
> MR. HYDE. There is no provision in the Communications Act that would prohibit such a rule as that. There is the principle, of course, that that would be discriminatory. In all our decisions we must make a finding that our action is in the public interest, and in making that finding, certainly, we will take into consideration such things as the discriminatory effect of any action.
>
> SENATOR CAPEHART. But you could, if you thought it was in the public interest then, simply say, 'We will not issue a radio license to anybody'?
>
> MR. HYDE. In some lawful business?
>
> SENATOR CAPEHART. Yes.
>
> MR. HYDE. I am very doubtful of that, Senator Capehart.
>
> SENATOR CAPEHART. *Well, do you have the right to do it if you want to?*
>
> MR. HYDE. *I could not claim that right; no sir. I believe we do not have it.*"
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> *Id.* at 103-04 (emphasis added).

Thereafter, the Committee terminated consideration of Section 14. The following excerpts from the Committee Report make clear that this action was taken "solely because" of the FCC's position on the matter.

> "The Committee deems it important to point out why this section was dropped from the bill. This

language was first proposed nearly 6 years ago during hearings on a Communications Act amendments bill, solely because the Federal Communications Commission at that time had under consideration a rule which would prohibit newspapers from becoming holders of radio licenses. While the Commission may have been motivated, in part at least, by the best intentions in seeking to prevent monopolistic control of organs of public expression in a community, *its threatened action was of questionable constitutional validity, particularly in the absence of specific authority in the basic act to adopt such a rule. . . .*

"In testimony on the bill (S. 1973) before this committee, the Commission spokesman pointed out that present Commission practice and procedure has been in accord with the proposed section for several years; that they have serious doubts of the constitutionality of any rule which would prohibit the granting of a license to anyone because of kind of lawful occupation; and *that in any event they could not constitutionally do what the proposed section 14 would have prohibited them from doing.*

"The Committee is impressed by the validity of this testimony. In view of the positive nature of the affirmations by the Commission that its existing procedure is in accord with that which had been intended by the original language, some question was raised as to whether or not the proposed new language might not be construed or interpreted to provide a different or modified procedure from that now being followed. The committee, therefore, decided to eliminate the proposed section. *It should be distinctly understood that in eliminating the section the committee has done so solely because this Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional*

> *authority to follow any other procedure.*" S. REP. No. 741, 81st Cong., 1st Sess. 2 (1949) (emphasis added).

Subsequently, S. 1973 was considered in the House of Representatives, where Section 14 was replaced by a proposed new subsection (d) of Section 308, of the Communications Act, providing as follows:

> "(d) The Commission shall not make or promulgate any rule or regulation, of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information and no application for a construction permit or station license, or for the renewal, modification, or transfer of such a permit or license, shall be denied by the Commission solely because of any such interest, association, or ownership."

The entire bill, including the so-called "newspaper amendment," was debated extensively and subsequently passed by the House without a record vote.

In conference, the newspaper amendment was deleted from the bill eventually enacted as the 1952 Communications Act Amendments because both the Senate and House conferees unanimously agreed that it was unnecessary under the existing statute. The position of the Senate conferees reiterated the reasons previously given for terminating consideration of Senate Bill 1973. The joint statement of legislative intent issued by the conference committee read as follows:

> "This provision was omitted from the conference substitute because the committee of conference felt

> that it was unnecessary. It is the view of the conference committee that *under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper* or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application solely because of any such interest or association." CONFERENCE REPORT No. 2426, 82d Cong., 2d Sess. 18-19 (1952) (emphasis added).

After 1952, the FCC continued to assure Congress that it had no authority to pass anti-newspaper rules such as those at issue. Chairman McConnaughey, testifying on various bills, including two anti-discrimination bills, before the House Interstate and Foreign Commerce Committee in 1956, stated that the Commission fully agreed with the opinion of the 1952 Conference Committee that an anti-discrimination provision was "unnecessary for the reasons that the Commission did not have the authority to promulgate any rule discriminating against newspapers or to arbitrarily deny an application solely because of such interest." *Hearings on Miscellaneous Bills To Amend the Communications Act of 1934 Before a Subcomm. of the House Interstate and Foreign Commerce Comm.*, 84th Cong., 2d Sess. 83 (1956).[22]

In sum, for a period beginning shortly after passage of the 1934 Act and continuing until the present case,

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[22] Chairman McConnaughey also said the Commission was concerned that the proposed legislation would prohibit consideration of diversity as one of the relevant factors in a comparative licensing proceeding. *Id.* at 84.

the FCC has consistently adhered to the position that it lacks the authority to adopt anti-newspaper regulations such as those here at issue.[23] Congress has repeatedly considered the issue, and has relied on assurances given it by FCC spokesmen in three different decades in asserting that the Commission is not authorized to adopt such regulations. Similarly, the only court to consider the question reached the same conclusion as did the FCC and Congress.

Instead of closely scrutinizing these prior constructions, the court below dismissed this subsequent legislative interpretation in a footnote, labeling it "not useful in determining the meaning of the original legislation when enacted." 555 F.2d at 952, n.41 (A. 378). In so doing, it overlooked this Court's repeated teaching that a contemporaneous and longstanding construction of a statute by administrative officials, followed by a reenactment of or amendment to the Act which does not touch the administrative interpretation in question, is entitled to great weight.[24]

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[23] The only arguable deviation from that position was the institution of the FCC's Newspaper Investigation in 1941 (discussed *supra* at 36-37), which culminated in the FCC's dismissing the proceeding in light of the "grave legal and policy questions involved." 9 Fed. Reg. 702 (1944). Furthermore, the institution of the investigation in 1941 may have been due more to the political climate of the time than to the FCC's view of its authority. *See The Newspaper-Radio Decision*, 7 J. FED. COM. B.A. 11, 12 (Feb. 1944).

[24] *See* Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 409-10 (1975); Saxbe v. Bustos, 419 U.S. 65, 74 (1974); NLRB v. Gullett Gin Co., 340 U.S. 361 (1951); 2A [SUTHERLAND] STATUTES AND STATUTORY CONSTRUCTION § 49.09, at 256-57 (4th ed. C. Sands 1973).

Given the fact that the authority to adopt rules barring daily newspapers from affiliation with local broadcast stations is not necessarily or readily inferable from the language of the Communications Act, the consistent, long-standing construction that the FCC lacks such authority should be honored, particularly as this construction frees the Act from "not insubstantial constitutional doubts." *Lynch v. Overholser, supra,* 369 U.S. at 711.

III. THE FCC'S PROSPECTIVE RULES REPRESENT AN UNJUSTIFIED REVERSAL OF ITS PRIOR LICENSING POLICIES WHICH IS NOT FOUNDED ON A REASONED ANALYSIS OF THE RECORD

It is well settled that a reviewing court must set aside agency action which is not the product of "reasoned decisionmaking." *Fidelity Television, Inc. v. FCC,* 515 F.2d 684, 699 (D.C. Cir. 1975); *Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). The court must "assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968). Finally, to enable the court to perform its review function, the "agency or commission must articulate with clarity and precision its findings and the reasons for its decisions." *WAIT Radio v. FCC,* 418 F.2d 1153, 1156 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972).

In promulgating its prospective rules, the FCC reversed its longstanding policy of considering diversification of control of the mass media as merely one factor among many bearing on the public interest in the future licensing of broadcast stations to newspaper publishers. Moreover, the FCC effectuated this change

in course despite its acknowledgment that "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." SR&O ¶ 102, 50 F.C.C.2d at 1075 (A. 190).

In its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 394 (1965), the Commission identified two primary objectives of its licensing policy: "first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications."

The FCC's prospective anti-newspaper rules are avowedly confined to the second of these two objectives:

> "It appears that the licensing of a newspaper applicant for a station in the same city as that in which the paper is published is not going to enhance diversity .... We think that any new licensing should be expected to add to local diversity. Accordingly, the rules will bar combinations that would not do so." SR&O ¶ 101, 50 F.C.C.2d at 1075 (A. 190).

The FCC's *ipse dixit* that licensing a newspaper publisher for a co-located broadcast station will not add to diversity has no factual support and is nowhere further explained in a way which could permit either the court of appeals or this Court to conclude that the FCC's reasoning is sound. In fact, the statement is contradicted by the FCC's own admission that jointly owned newspapers and broadcast stations do in fact speak with diverse voices. SR&O ¶ 131, 50 F.C.C.2d at 1089 (A. 219). Moreover, the FCC nowhere in its decision adverts to any evidence whatsoever of a want of diversity of expression between newspaper and broadcast affiliates. Thus, the FCC has accurately characterized the goal of its prospective rules as no more

than "a small gain in diversity" (SR&O ¶ 112 n.30, 50 F.C.C.2d at 1080 n.30 (A. 200)), or, even more to the point, "a mere hoped for gain in diversity" (SR&O ¶ 109, 50 F.C.C.2d at 1078 (A. 196)). The FCC has, therefore, made no showing that any increase in diversity is likely to result from its prospective rules. In the absence of any such support, its decision has no rational basis.

The FCC gave no reasons for abandoning public service factors as a consideration in the prospective licensing of local broadcast stations to daily newspaper publishers. Instead, the FCC unabashedly eschewed consideration of the consequences of its prospective actions, stating that "[a]s to prospective interests, we concluded that we were free to act to foster diversity without being concerned about negative impact from our action." SR&O ¶ 112, 50 F.C.C.2d at 1081 (A. 202). Because of this flaw in the agency's decision, its rules must be set aside in accordance with the principle set forth in *Greater Boston Television Corp. v. FCC*, *supra*, 444 F.2d at 852 (footnotes omitted):

> "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."

Here, the FCC's decision is "intolerably mute."

In determining not to order general divestiture of newspaper-broadcast combinations, the FCC properly

took account of the need for stability and continuity of ownership of those licensees which serve important public purposes. The FCC also made several key empirical findings on the basis of the evidence before it. The agency found that, in general, there already exists a substantial and increasing diversity in the mass media in most communities (SR&O ¶¶ 47-50, 98, 50 F.C.C.2d at 1060-61, 1073 (A. 161-163, 186)); that there is already significant diversity between affiliated broadcast stations and newspapers (SR&O ¶¶ 131-32, 50 F.C.C.2d at 1089-90 (A. 218-220)); and that newspaper-affiliated broadcast stations have compiled "a long record of service to the public" (SR&O ¶ 109, 50 F.C.C.2d at 1078 (A. 196)). Finally, the FCC found no evidence of abuses arising out of newspaper-broadcast cross-ownership. *See* SR&O ¶ 96, 50 F.C.C.2d at 1072 (A. 184).

These findings, which describe present conditions, would have amply supported a conclusion by the FCC that it should continue its prior policies, which gave all applicants for a broadcast license an equal and fair chance to show that they can serve the public interest. Instead, the Commission adopted prospective rules banning the formation of future newspaper-broadcast combinations.

The court of appeals took a similar one-track approach in its consideration of the validity of the prospective rules. The lower court found that the ban had a rational basis, even though "there is no guarantee that the prospective ban will increase diversity in all cases," because "the licensing of an independent, rather than an affiliated station, offers greater hope of providing the community a new voice." 555 F.2d at 950 (A. 373-374).

In sum, the FCC in adopting the prospective rules, and the court of appeals in affirming them, both ignored the more important and basic goal of public service in favor of a "single-value" approach that elevates a purely speculative "hoped for gain in diversity" above all other factors. Because the Commission failed to give "reasoned consideration to each of the pertinent factors" affecting the public interest, its prospective rules are arbitrary, capricious, and an abuse of discretion, and must be set aside. *Permian Basin Area Rate Cases, supra,* 390 U.S. at 792; 5 U.S.C. § 706(2)(A).

IV. THE LOWER COURT ERRED IN REVERSING THE FCC'S DECISION NOT TO DIVEST MOST EXISTING NEWSPAPER-BROADCAST COMBINATIONS

A. The FCC Reasonably Concluded from the Record that There Was No Factual Basis for Divestiture and that There Was Support for the Continued Licensing of Existing Broadcast Stations Affiliated with Local Newspapers

1. The record contained adequate data for the FCC to use in decisionmaking and the FCC made conclusions based on the record

The court of appeals depreciated the significance of the evidence before the agency in order to support its theory that "in determining its divestiture policy, the Commission necessarily had to rely primarily on policy, not factual considerations." 555 F.2d at 957 (A. 395) (footnote omitted). In stark contrast with the court's statement that "[t]he voluminous record of the lengthy rulemaking proceeding contains little reliable 'hard' information" (555 F.2d at 956 (A. 392)), however, more than 30 fact-filled "major studies" were

submitted by the parties, in addition to a detailed statistical analysis of programming by the FCC staff.[25]

Moreover, largely on the basis of a statement on brief by FCC counsel that "most of the studies" were inconclusive, the court below made the unwarranted assumption that the Commission found the record as a whole inconclusive. 555 F.2d at 957, 962 & n.89 (A. 395, 413-414).

In this respect, the court simply took advantage of the obvious fact that the FCC could not—and was not required to—make detailed findings concerning every branch of every sub-issue raised in the 200-plus comments before arriving at normative conclusions on the basic questions bearing on the need for and impact of divestiture. The court's own review of the record failed to show that the evidence concerning divestiture was inconclusive, and conveniently ignored the fact that the FCC's order showed that the agency itself was able to reach conclusions on each of the key issues. Thus, the court of appeals failed to heed this Court's mandate that "[a]lthough [the] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

On the question of the effects of common ownership on station performance, the record was replete with evidence that newspaper-affiliated broadcast stations provide superior public service. The FCC had before it and expressly considered factual evidence that own-

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[25] The major studies are listed in Appendix B of the SR&O, 50 F.C.C.2d at 1093 (A. 226). The staff study is printed as Appendix C to the SR&O, 50 F.C.C.2d at 1094 (A. 228).

ers of newspaper-broadcast combinations set higher journalistic standards than do other owners (SR&O ¶ 63, 50 F.C.C.2d at 1064 (A. 169)); that economies of common ownership permit better and more diverse programming (SR&O ¶ 64, 50 F.C.C.2d at 1064-65 (A. 169-171)); and that stations affiliated with local newspapers are often locally owned, and in any event, tend to be more familiar with, and more immersed in, the needs and problems of their local communities than other stations (SR&O ¶¶ 65, 78, 50 F.C.C. 2d at 1065, 1068-69 (A. 171, 176-178)). In contrast, the argumentative comments submitted to the FCC by proponents of divestiture merely asserted that new owners could theoretically improve service. SR&O ¶ 66, 50 F.C.C.2d at 1065 (A. 171).

The court of appeals appeared to regard as significant the results of two early empirical studies [26] which applied different methodologies to the same data and found no significant differences between newspaper-affiliated stations and others in the amount of news, public affairs, and local programming carried. These studies, however, were made before the more complete and reliable data contained in the FCC's first annual television programming report became available. SR&O ¶ 97, 50 F.C.C.2d at 1073 (A. 186). The FCC's staff analyzed the information in this report for the agency and found that "stations owned by co-located newspapers broadcast significantly more minutes in several categories of local programming, other

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[26] Comment of Students' FCC Study Group (May 17, 1971); H.J. Levin, The Policy of Joint Ownership of Newspaper and TV Stations: Some Assumptions, Objectives and Effects (April 12, 1971). *See* 555 F.2d at 958 (A. 400).

important factors being equal." SR&O App. C, 50 F.C.C.2d at 1096 (A. 234).

The FCC accepted the results of its staff's study and found that it demonstrated an "undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars." SR&O ¶ 109 n.26, 50 F.C.C.2d at 1078 n.26 (A. 196-198). As a more general conclusion, the FCC held that newspaper-affiliated stations had established "traditions of service" and "a long record of service to the public." SR&O ¶ 109, 50 F.C.C.2d at 1078 (A. 196). The court's criticism of the FCC's draftsmanship—that "the Commission did not *stress* this superiority in deciding to grandfather most stations" (555 F.2d at 957 (A. 395) (emphasis added))—can hardly erase the Commission's findings or detract from their importance.

The court of appeals appeared to agree with the FCC that the record before it contained no evidence "that newspaper-television station owners have committed any specific non-competitive acts as such." SR&O ¶ 96, 50 F.C.C.2d at 1072 (A. 184). Instead, the court took notice of the innuendos in the Barnett report,[27] a paper which was not part of the record before the agency and which, in any event, by Barnett's own admission, is not based on systematic research and consists primarily of anecdotal examples which "admittedly vary in their force as evidence." *See* Barnett report at 15 (A. 1000). The reliance of the court of appeals on this weak submission merely serves to em-

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[27] S. Barnett, Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R. Markle Foundation (Sept. 23, 1974). (A. 990).

phasize the dearth of "hard" evidence of competitive abuse by combination owners.[28]

A principal issue on which studies were submitted to the FCC was the question of whether any monopoly price effect could be found in newspaper-affiliated TV station advertising rates. As the court of appeals confirmed, the FCC found the methodology of the only study purporting to show such an effect to be defective (555 F.2d at 959 (A. 403)), and, accordingly, the agency found no adverse effect on advertising rates attributable to newspaper ownership. SR&O ¶¶ 39, 96, 50 F.C.C.2d at 1057, 1072 (A. 155, 184). Finally, the FCC noted that there had been no submission of specific industry-wide data showing undue concentration. SR&O ¶ 112 n.29, 50 F.C.C.2d at 1080 n.29 (A. 200).

On the subject of the adequacy of existing multiplicity and diversity in the media, the FCC considered submissions by opponents of divestiture which established that affiliated newspapers and broadcast stations do not offer the same viewpoints and information to readers, listeners, and viewers. SR&O ¶ 45, 50 F.C.C. 2d at 1059 (A. 159). In addition, the FCC reviewed several studies which showed that there has been a long-term trend of increasing diversity, and that the number of separate media voices in most markets is extremely high. SR&O ¶¶ 47-50, 98, 50 F.C.C.2d at 1060-61, 1073 (A. 161-163, 186). Finally, the FCC

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[28] Even if the record had disclosed isolated cases of previously undiscovered abuses, the FCC's long-standing renewal policy, which permits the raising of such specific issues in petitions to deny license renewal applications, would have provided a ready vehicle for their correction. *See* SR&O ¶ 130, 50 F.C.C.2d at 1088 (A. 216).

considered comments showing that developing law such as the Fairness Doctrine, Equal Time, and "access to the broadcast media" ensure a multiplicity of viewpoints over broadcast stations. SR&O ¶ 51, 50 F.C.C.2d at 1061 (A. 163). *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969).

The court of appeals' discussion of this issue suggests that the agency reached no conclusions. Actually, the FCC found that any gain in diversity to be expected from separate ownership would in most cases be "theoretical" and more to be "hoped for" than assured. SR&O ¶¶ 109, 114, 50 F.C.C.2d at 1078, 1083 (A. 196, 207). The FCC concluded that it was dissatisfied with the overall level of diversity only in cases where a "single full-fledged choice" was not available to deal with local issues. In all other cases, the FCC determined that "there would not be such an unacceptable level of undue concentration." SR&O ¶ 112, 50 F.C.C.2d at 1080-81 (A. 200-202).

On the issue of the economic consequences of divestiture, two major studies were submitted to the FCC showing that the sale of TV stations under divestiture conditions would result in substantial economic losses to their owners. SR&O ¶ 95, 50 F.C.C.2d at 1072 (A. 184). Studies further showed that cost increases for station operation would flow from divestiture, and that capital costs would increase to levels where many stations could only be purchased by existing multiple owners or nationwide conglomerates. SR&O ¶¶ 56-57, 50 F.C.C.2d at 1062-63 (A. 165-167). The FCC discussed evidence that these cost increases would reduce the funds available for programming. SR&O ¶ 77, 50 F.C.C.2d at 1068 (A. 176). Numerous com-

ments indicated that divestiture would have an adverse economic impact on newspapers by depressing values, forcing marginal operations out of business, and limiting newspapers' ability to use electronic distribution. SR&O ¶ 74, 50 F.C.C.2d at 1067 (A. 174).

The court of appeals emphasized that the FCC felt that the "concern" expressed in the economic studies "may be exaggerated." 555 F.2d at 961 (A. 410). But the Commission concluded that, nonetheless, divestiture could create "[l]ocal economic dislocations . . . as a result of the vast demand for equity capital" and that "wide-scale divestiture could increase interest rates and affect selling price too." SR&O ¶ 108, 50 F.C.C.2d at 1078 (A. 196).

In sum, the court of appeals failed to recognize that the FCC found the record on all of the key factual issues adequate to reach conclusions that there was no need for divestiture and that divestiture would have serious adverse consequences.

2. The FCC's decision not to divest most existing combinations was based on its conclusions from the record

Despite the lower court's attempt to characterize the FCC's decision concerning divestiture as relying "primarily on policy, not factual considerations" (555 F.2d at 957 (A. 396) (footnote omitted)), the factual context significantly influenced the FCC's policy decision. In the agency proceeding, the FCC ultimately found that it must weigh the risk of loss to the public of the generally superior service of newspaper-affiliated stations against the speculative possibility that an unknown new applicant would provide at least equal

public service while adding to diversity and/or decreasing concentration.[29]

The evidence presented to the FCC as well as that in its own files demonstrating that existing newspaper-affiliated stations provide generally superior service was essentially unchallenged.[30]

On the issue of economic concentration, the FCC reasonably concluded that this factor should be assigned very little, if any, weight in light of the total failure of proof either of monopoly prices or of industry-wide patterns of abuse.[31] *See* SR&O ¶¶ 39, 96, 112 n.29, 50 F.C.C.2d at 1057, 1072, 1080 n.29 (A. 155, 184, 200).

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[29] The FCC made it clear that it will continue to consider diversity as one of the factors to be weighed in comparative hearings where it is presented with a bona fide choice. SR&O ¶ 129, 50 F.C.C.2d at 1088 (A. 216).

[30] Even the two dissenting Commissioners acknowledged the generally high level of public service rendered by newspaper-affiliated stations. For Commissioner Hooks, "the superior performance of many newspaper-owned stations" elicited a "bird in the hand is worth two in the bush" response. 50 F.C.C.2d at 1109 (A. 269). Commissioner Robinson, the lone dissenter to non-divestiture, conceded that "there is some superficial force to the assertion that newspapers make superior licensees since some newspaper-owned stations have a reputation for being among the best stations in the country." 50 F.C.C.2d at 1120 (A. 291).

[31] By deferring detailed examination of economic monopolization questions to ad hoc proceedings, the FCC cannot be said to have ignored this factor, but merely to have determined that it is best considered in the context of particularized facts about specific markets. This is entirely consistent with the lack of evidence before the FCC of overall problems, and accords proper recognition to the contentions of the Department of Justice and others in separate filings regarding the possibility of abuse in individual situations. *See* SR&O ¶¶ 112 n.29, 130, 50 F.C.C.2d at 1080 n.29, 1088 (A. 200-202, 218-219).

Regarding the adequacy of existing diversity and the likelihood that divestiture would significantly increase diversity, the FCC had before it substantial evidence that great and increasing diversity is the norm in most areas on most issues. SR&O ¶¶ 47-50, 98, 50 F.C.C.2d at 1060-61, 1073 (A. 161-163, 186). Moreover, the FCC found no evidence that it is the norm for affiliated newspapers and broadcast stations to speak with one voice. SR&O ¶¶ 131-32, 50 F.C.C.2d at 1089 (A. 218). Indeed, the agency emphasized that it attached considerable weight to this latter finding:

> "Even if separate operation cannot be equated with separate ownership, it is nonetheless an important point. Were it otherwise and the two operated jointly, it might have been necessary for the Commission to act to require divestiture in many more situations. If the power of the print-broadcast combination were exercised monolithically or if the print and media outlets were mirror images of one another, speaking with one voice, we would have to be concerned." SR&O ¶ 131, 50 F.C.C.2d at 1089 (A. 218).

In this factual framework, it was entirely reasonable for the FCC to assign relatively less weight to the speculative benefits to the public that might accrue from a possible small increase in diversity than to the proven record of service in the public interest established by existing licensees.

Finally, the FCC concluded that there was a likelihood that "local economic dislocations" would result from divestiture and that interest rates could increase. SR&O ¶ 108, 50 F.C.C.2d at 1078 (A. 196). In assigning weight to this factor the FCC could reasonably conclude from the evidence before it (SR&O ¶ 77,

50 F.C.C.2d at 1068 (A. 176)) that these economic losses would have some adverse impact on service to the public because of a reduction in net return available for improvements in station operation.

Having reasonably concluded that the potential benefits from divestiture were small and speculative and that divestiture presented a risk of loss in service, whereas existing ownership served the public interest, it was entirely reasonable for the FCC to reach its ultimate judgment that it was neither necessary nor appropriate to order divestiture.[32]

B. The Renewal of Existing Broadcast Station Licenses Held by Local Newspaper Publishers Is Entirely Consistent with Applicable Law and Precedent

1. The goal of diversity, as only one of many factors bearing on the public interest, does not create a presumption against newspaper-broadcast cross-ownership

The FCC's decision not to divest most existing combinations was entirely consistent with the FCC's prior policy of balancing the detriments of divestiture against alleged benefits, and of considering the benefits to the public interest of continued service by existing licensees. *See, e.g., National Broadcasting Co. v. United States,* 319 U.S. 190, 207 (1943).

The FCC's uniform policy in broadcast licensing has been to consider diversification of control of the mass media as only one of many factors bearing on the pub-

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[32] The fact that the FCC did order divestiture in the case of some small markets is not evidence to the contrary. While the FCC purported to base that decision on unique circumstances in the amount of diversity, the logic of its whole Second Report and Order, to say nothing of constitutional and statutory limitations, would require that it not order any divestiture by generally applicable rule.

lic interest. These factors include (1) diversification of control of the media of mass communications, (2) full-time participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of frequency, (6) character, and (7) other factors.[33] Specifically, an applicant's affiliation with a local newspaper has never been considered a bar to obtaining a broadcast license.[34] Moreover, although the FCC may consider competitive factors as part of the public interest standard of the Communications Act, it is well settled that the FCC is not empowered to enforce the antitrust laws, *United States v. Radio Corporation of America,* 358 U.S. 334 (1959), nor may it "automatically equate the public interest with additional competition." *Hawaiian Telephone Co. v. FCC,* 498 F.2d 771, 777 (D.C. Cir. 1974).

The FCC routinely has found that the unopposed initial grants or renewals of broadcast licenses to local newspaper affiliates are in the public interest. The FCC has also awarded broadcast licenses to newspaper affiliates after exploring the concentration of control issue in a hearing.[35] When the FCC has been presented with facts showing specific anticompetitive abuses, it

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[33] These factors are enumerated in the Commission's Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). In considering applications for a license renewal, as distinguished from a new license, the FCC does not apply the Policy Statement to balance these factors but gives great weight to the performance of a meritorious incumbent. *See* Seven (7) League Productions, Inc. (WIII), 1 F.C.C.2d 1597, 1598-99 (1965); Belo Broadcasting Corp., 47 F.C.C.2d 540, 544 (1974).

[34] Policy Statement on Newspaper Ownership, 9 Fed Reg. 702 (1944); Orlando Daily Newspapers, Inc., 11 F.C.C. 760 (1946).

[35] Lee Enterprises, Inc., 23 F.C.C.2d 522 (1970).

has denied licenses to newspaper affiliates in a non-comparative hearing context.[36]

Where, however, there has been a competing application for the license, the FCC, in evaluating all the relevant public interest factors,[37] in some cases has found that the diversity factor may tip the balance in favor of the non-newspaper-affiliated applicant.[38] In other cases, the FCC has determined that other factors predominate and has awarded the license to the newspaper affiliate.[39] The FCC has, however, never presumed that diversity must always be given predominant weight over other factors.[40]

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[36] *E.g.*, Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950) (coercive advertising practices).

[37] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

[38] McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); Radio Wisconsin, Inc., 20 F.C.C. 235 (1955).

[39] *E.g.*, Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956) (local programming); Le Mond, Jones & Fisher, 11 F.C.C. 919 (1947) (community knowledge); Capitol Broadcasting Co., 11 F.C.C. 859 (1947) (coverage, frequency use); Orlando Daily Newspapers, Inc., 11 F.C.C. 760 (1946) (efficient frequency use, community knowledge, community service); Times Publishing Co., 4 F.C.C. 400 (1937) (public service).

[40] Indeed, even in the FCC's statement of its licensing policy made in the comparative hearing context—where the FCC is free to balance policy considerations without concern for built-up equities—it listed its "first" objective as being "the best practicable service to the public," whereas "a maximum diffusion of control of the media of mass communications" was only "second." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965).

From the time this issue was first raised, the courts, too, have stated that the FCC has discretion to find that it would serve the public interest for a newspaper applicant to be granted a broadcast license.[41] In the words of Commissioner Hooks in his separate opinion:

> "Overwhelmingly, the attitude of the courts towards bare cross-ownership has been *nehil nequam est praesumendum* (nothing wicked is to be presumed)." 50 F.C.C.2d at 1109 (A. 269).[42]

Sections 307 and 309 of the Communications Act require that the FCC consider the "public interest, convenience, and necessity" in awarding broadcast licenses. 47 U.S.C. §§ 307(a), 309(a). There are numerous components of the public interest and the FCC must exercise its judgment in weighing each of them. In a classic statement, the court of appeals held that "the Commission is entitled to consider diversification of control in connection with all other relevant facts and *to attach such significance to it as its judgment dictates.*" *McClatchy Broadcasting Co. v. FCC,*

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[41] Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958), *modified*, 295 F.2d 131, *cert. denied*, 366 U.S. 918 (1961); McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); Tri-State Broadcasting Co. v. FCC, 96 F.2d 564 (D.C. Cir. 1938). *See* Stahlman v. FCC, 126 F.2d 124 (D.C. Cir. 1942).

[42] Commissioner Hooks cited, in support of his statement, Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958), *modified*, 295 F.2d 131, *cert. denied*, 366 U.S. 918 (1961); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956); McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) (emphasis added)."

The lower court, in establishing a "presumption that cross-owned stations do not serve the public interest," completely ignored this long history of agency and court decisions to the contrary." Instead, the court simply assigned its own preferred weights to the numerous factors bearing on the public interest and concluded that it would treat diversity as the controlling consideration.

The lower court's attempt to upset the weight assigned by the FCC to the various components of the public interest is patently inconsistent with its limited

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" The court has further indicated that even in comparative renewal hearings, where the FCC is presented with a choice of qualified licensees, "*superior* performance should be a plus of major significance." Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 (D.C. Cir. 1971). As to the factor of diversity, while recognizing its importance, the court stated that "[d]iversification is a factor properly to be weighed and balanced with other important factors." 447 F.2d at 1214 n.36. In another case, the court recognized that the weight to be accorded "diversification in its quantitative form" may properly be based upon consideration of the number of other media outlets in a market and whether an existing licensee has operated affiliated outlets "autonomously and independently." Fidelity Television, Inc. v. FCC, 515 F.2d 684, 701 (D.C. Cir. 1975).

" Strangely, the court asserted that the FCC's own "long-standing policy" constituted its most important support for the presumption in favor of divestiture. 555 F.2d at 963 n.93 (A. 418). As shown above, this "long-standing policy" never elevated diversity above other factors as the exclusive touchstone of the public interest. The court purported to draw additional support for its presumpion of diversity from the Communications Act and from the First Amendment. As shown in the preceding sections, precisely the opposite conclusion, namely that the FCC cannot adopt anti-newspaper rules, follows from a correct interpretation of the Communications Act and the First Amendment.

reviewing role. This role has been defined by this Court as follows:

> "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

In particular, this Court has held, in passing on judgments made by the ICC under the same public interest standard as that embodied in the Communications Act, that the weighing of consumer benefits against adverse impact on members of the regulated industry is "the kind of judgment that is entrusted to [the ICC], a power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). Likewise, here the balancing of interests in diversity, competition, public service, and economic injury is "the kind of judgment that is entrusted to" the FCC."

"The court of appeals recently articulated, in National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), the proper standard of review when the FCC balances competitive considerations against other public interest factors in a rulemaking proceeding. In that case, the court reviewed the FCC's allocation of a large block of frequency spectrum to AT&T and other carriers, and concluded that "significant anticompetitive effects may well result." 525 F.2d at 638. Nonetheless, the court defined its own reviewing role as a narrow one:

> "We conclude that such determinations are precisely the sort that Congress intended to leave to the broad discretion of the Commission, by imposing a broad public convenience, interest,

The court of appeals purported to rationalize the substitution of its own policy preference for the reasoned decision of the agency by denigrating the countervailing policies which the FCC considered important. Thus, the court asserted that the value of preserving local ownership and management "are not of primary importance to the Commission" because a licensee is allowed by the Commission to transfer his license to a non-local new owner. 555 F.2d at 963 (A. 417). Nonetheless, the Commission has always considered local ownership and management to be highly desirable,[46] and was certainly acting rationally when it assigned some weight to the fact that broad divestiture would disrupt numerous operations with a long tradition of local ownership and management. SR&O ¶ 108, 50 F.C.C.2d at 1078 (A. 196). The lower court's sheer speculation that new local entrepreneurs will emerge to take over operations is no substitute for the FCC's experienced judgment that "many sales will have to be turned over to outside interests." SR&O ¶ 108, 50 F.C.C.2d at 1078 (A. 196).

The court of appeals also downgraded the FCC's partial reliance on the policy goal of continuity of operation by claiming that it is at odds with the FCC's

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or necessity standard. In cases of such broad delegations to expert agencies, the standard of review is that of the reasonableness of the conclusions reached." 525 F.2d at 636 (footnote omitted).

Recognizing that anticompetitive effects were "contingent upon a variety of factors," the court held that the FCC's action was not "a breach of the broad discretion allocated to the Commission under the statute." 525 F.2d at 638 (footnote omitted).

[46] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395-96 (1965).

assignment policies. Here, the court simply misstated the agency's assignment policies by asserting that the FCC has the practice of "routinely approving license assignments." 555 F.2d at 964 (A. 421). The fact that the FCC generally prefers not to force unwilling owners to continue operation does not detract from the value it assigns continuity. In truth, the FCC places a high value on "sustained station ownership." *Applications for Voluntary Assignments or Transfers of Control,* 32 F.C.C. 689, 690 (1962). Its anti-trafficking rule requires a full hearing on any transfer applications during the initial license term. 47 C.F.R. § 1.597. These rules are based on the proposition that "uncertainty on the part of station personnel and disruption in operational continuity" may result in "programming deterioration incompatible with broadcasting in the public interest." *Notice of Proposed Rulemaking,* 25 Fed. Reg. 12898 (1960).

Finally, the court below questioned the relevance of economic dislocations as a proper factor to be considered by the agency. In fact, however, as the court appeared to recognize, the FCC did not specifically base its decision on economic hardship to individual owners. Nonetheless, it was not improper for the FCC to select a course of action, fully justified by other policies, which also avoided adverse financial impact on businesses which have long served the public interest. Moreover, assurance of reasonable stability in the industry is necessary to induce entrepreneurs to provide the risk capital and operating resources needed to establish a successful station and to develop quality programming. *See Times-World Corporation v. United States,* 251 F. Supp. 43, 45 (W.D. Va. 1966); Geller, *The Comparative Renewal Process in Television:*

Problems and Suggested Solutions, 61 VA. L. REV. 471, 497-98 (1975).

This Court has approved such consideration of the licensee's business interests. In the FCC's 1941 *Report on Chain Broadcasting,* the agency found that network ownership and operation of stations caused restraints on competition. The FCC, however, thought "it inadvisable to compel these networks to divest themselves of all their stations" and decided to require divestiture of only a small number of them, particularly where a network owned two stations in one area.[47] On review, this Court specifically noted that the FCC had balanced the network's "substantial business interests," as a factor bearing on the public interest, against the competitive considerations, and concluded, in affirming the FCC's action, that complete divestiture would have been an unnecessarily "drastic step." *National Broadcasting Co. v. United States,* 319 U.S. 190, 207 (1943).

2. There is no legal requirement that the FCC act retroactively and divest existing combinations

In requiring that the FCC, in addition to adopting a prospective ban on newspaper-broadcast cross-ownership, must also order broadscale divestiture of existing combinations, the court of appeals overstepped the proper bounds of judicial review. The practical effect of the court's requirement of a "presumption" against all such cross-ownership is to deny the FCC the discretion to regulate prospectively. That denial of discretion constitutes a serious usurpation of the Commission's authority, and runs contrary to the long-

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[47] *Report on Chain Broadcasting* at 66-69.

standing preference for prospective rulemaking as a method of regulation.

The Commission has frequently "grandfathered" non-conforming situations when it has changed one of its policies.[48] Indeed, in adopting a number of new rules designed to promote diversification of ownership, the Commission has made distinctions between prospective and retrospective application of the new restrictions. For example, when the Commission amended its rules in 1964 to reflect stricter and more precise standards for determining prohibited overlap in the service areas of co-owned AM, FM or television broadcast stations, it did not require divestiture of existing combinations. *Multiple Ownership of Standard, FM and Television Broadcast Stations,* 45 F.C.C. 1476 (1964). Similarly, no divestiture was required by the Commission when, in 1970, it adopted rules prohibiting common ownership of television and radio stations in the same market. *Multiple Ownership of Standard, FM and Television Broadcast Stations,* 22 F.C.C.2d 306 (1970) (A. 33). The Commission's decisions to grandfather existing interests have on numerous occasions been upheld by the courts. *See, e.g., Buckeye Cablevision,*

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[48] *See, e.g.,* Revision of FM Broadcast Rules, 40 F.C.C. 720 (1962) (existing high power FM stations grandfathered when new maxima on power and coverage adopted); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725 (1966), *aff'd,* Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967) (rules limiting signal carriage by cable television systems adopted with grandfathering of existing non-conforming systems); Cable Television Report and Order, 36 F.C.C.2d 143 (1972) (non-conforming existing systems grandfathered when signal carriage rules revised). In each of these situations, the Commission's decision to grandfather existing, non-conforming situations was grounded in concern that retroactive application would result in disruption of established service.

Inc. v. FCC, 387 F.2d 220 (D.C. Cir. 1967) (grandfathering of cable system importation of distant signals held to be permissible in order to avoid disruption of established viewing habits); *Committee for Open Media v. FCC*, 533 F.2d 1 (D.C. Cir. 1976) (exempting established small cable systems from certification requirement). In *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 324 (D.C. Cir. 1974), the District of Columbia Circuit implicitly approved the grandfathering of interests which did not conform to the "one to a market rule" adopted by the FCC in its First Report and Order, *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C. 2d 306 (1970) (A. 33). The court of appeals has not established a sufficient basis for reaching a contrary result in connection with the newspaper-broadcast cross-ownership rules in question here.

Prospective rulemaking has long been preferred as a method of regulation which affords flexibility and allows for fairness in treatment of the affected parties. "Retroactive changes in settled law may be unjust whether the change is made by administrative action, by a court decision, or by an administrative amendment designed to conform to changes brought about by judicial decisions. . . . Therefore changes in settled law, whether by judicial decision or otherwise, frequently should be limited to prospective operation." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09, at 351-52 (1958).[49] The courts have frequently recognized that prospective rules are the norm; retrospective applica-

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[49] This Court expressed its disapproval of retroactive changes in administrative practices more than a century ago in United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 15 (1833).

tion is justified only by strong public necessity. This Court has warned that "[r]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corporation,* 332 U.S. 194, 203 (1947). The Court further recognized that the manner of proceeding in a regulatory matter is a choice that "lies primarily in the informed discretion of the administrative agency." *Id.*

While an agency may in the proper circumstances conclude that a regulation should be given retroactive as well as prospective effect, and while every new principle may entail an incidental retroactive effect, a regulation need not be retroactive to be valid. On the contrary, this Court has stated that

> "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." *Id.* at 202.

Like rulemaking, legislation is generally prospective in nature. Grandfathering in the legislative context has been endorsed by this Court as an appropriate means to respond "to the felt need for regulating . . . through familiar administrative devices, while at the same time [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *United States v. Maher,* 307 U.S. 148, 153 (1939). Thus, the Commission acted in a manner frequently endorsed by the courts as the "preferred" method of regulating and in accord with a long history of prospective rulemaking. The FCC quite properly concluded that the retroactive application of new poli-

cies to require the divestiture of broadcast affiliates by newspaper publishers was unjust to the existing station owners, particularly in view of past Commission encouragement of newspaper-broadcast cross-ownership and of the Commission's repeated findings that existing newspaper-broadcast cross-ownerships have operated in the public interest, both of which have created expectations of continuation as Commission licensees.

Indeed, in view of the record compiled before the FCC demonstrating clearly that existing broadcast stations licensed to local newspaper publishers have served the public interest well, a failure by the Commission to grandfather those existing combinations would have been arbitrary, capricious, and irrational. The court of appeals has itself warned that the Commission may not disregard "legitimate renewal expectancies implicit in the structure of the [Communications] Act." *Greater Boston Television Corporation v. FCC,* 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). Other courts have explicitly stated, on the basis of the Commission's "consistent practice" of renewing broadcast licenses in the absence of licensee misconduct, that "[a] license, while technically granted for only three years at a time, is in economic operation one of infinite duration." *Richmond Television Corporation v. United States,* 354 F.2d 410, 412 (4th Cir. 1965) (footnote omitted); *Times-World Corporation v. United States,* 251 F. Supp. 43 (W.D. Va. 1966); *Knipe v. Commissioner,* 24 TAX CT. MEM. DEC. (CCH) 668 (1965). In denying a taxpayer the right to amortize over a finite period of years expenditures made in anticipation of grant of a broadcasting license, the Fourth Circuit noted that

no "licensee would seriously entertain an offer for the purchase of its business calculated on the assumption that business life was limited to the remainder of the current three-year licensing period. . . . [I]n the entire experience of the industry the term of the license is to all intents and purposes perpetual." *Richmond Television Corp., supra,* 354 F.2d at 412-13 n.5. Accordingly, while the Communications Act affords no guarantee that an existing licensee will retain its license for an additional term, the "entire experience of the industry" indicates that, in the absence of inferior service, a broadcast license is one of indefinite duration. Certainly, therefore, the records of meritorious service developed by most newspaper-affiliated stations should engender "legitimate renewal expectancies," which should not be dismissed.

C. The Court of Appeals Went Beyond Its Proper Judicial Role and Purported To Dictate the Rule Which the Agency Must Adopt

Consistently with the substitution by the court of appeals of its own policy judgments for those of the FCC, the court below went further and purported to dictate to the FCC a new divestiture rule, namely, "that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." 555 F.2d at 966 (A. 428) (footnote omitted).

It is clear that this attempt by the court to act as an administrative agency and promulgate its own rule is contrary to this Court's oft repeated rule that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC v.*

Idaho Power Co., 344 U.S. 17, 20 (1952). *Accord, Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-06 (1976); *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974); *SEC v. Chenery Corporation*, 318 U.S. 80, 88 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). As the Court explained in *Pottsville Broadcasting*:

> "[A]n administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." 309 U.S. at 145.

Without this balance between the legislative functions of the agency and the judicial functions of the court, the "distorting lenses" of the lower court's policy preferences will be brought into play in the implementation of the public interest standards of the Communications Act. *See Pottsville Broadcasting Co.*, 309 U.S. at 144.[50]

Much of the reasoning the court below used in support of its pro-divestiture prescription is based upon nothing more than the court's view that the FCC "did not stress" a study showing that newspaper-affiliated stations are superior (555 F.2d at 957 (A. 395)), that the FCC "did not indicate which methodology it accepted" in a study of advertising rates (555 F.2d at 959 (A. 403)), that the FCC "never explained

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[50] Even the United States, which agrees with the court of appeals' holding that the FCC's opinion does not support its conclusion, believed that the court of appeals went too far in attempting "finally to decide administratively unresolved questions." Memorandum for the United States at 3, FCC v. National Citizens Comm. for Broadcasting, Nos. 76-1471, *et al.* (Sept. 1977).

. . . why it had abandoned the presumption [of divestiture] in the notice of proposed rulemaking" (555 F.2d at 963 (A. 417)), and similar criticisms of the FCC's decisionmaking technique. Obviously, if the court, rather than the agency, attempts to address these objections in the first instance, the agency will be denied the central function Congress intended it to have, *i.e.*, the task of making and applying policy. And, indeed, the manifold errors made by the court of appeals in substituting its own views for those of the agency serve to highlight the impropriety of permitting the court to be both the initiator and final arbitrator of a divestiture rule.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed, except to the extent that it vacated the portions of the FCC's order which would require divestiture of existing small-market combinations.

Respectfully submitted,

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